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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IN RE ATLANTIC RICHFIELD COMPANY,
Petitioner.

Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit and the Honorable Dorothy W. Nelson and Stephen Reinhardt, Judges, United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 346 (1990), this Court held that plaintiff USA Petroleum Company ("USA Petroleum") "has failed to demonstrate that it has suffered any antitrust injury." On that basis, this Court reversed a decision by two judges of the Ninth Circuit (Dorothy W. Nelson and Stephen Reinhardt). On remand, the same two Ninth Circuit judges blatantly refused to follow this Court's holding. They instead ruled that USA Petroleum's antitrust case can proceed to trial, occasioning a dissent by Judge Arthur L. Alarcon explaining that he could not join the majority because "[m]y oath of office requires me to follow the mandate of the Supreme Court." 972 F.2d 1070, 1077 (9th Cir. 1992). The decision on remand presents the following questions reviewable by mandamus:

> Whether the Ninth Circuit's decision on remand mistakes or misconstrues the decree of this Court or refuses to give effect to this Court's mandate in either of the following respects:
>
> a. Whether the Ninth Circuit's decision allowing USA Petroleum another chance to demonstrate that it suffered antitrust injury improperly reopens an issue disposed of by this Court's holding "that respondent has failed to meet the antitrust injury test in this case." 495 U.S. at 335.
>
> b. Whether the Ninth Circuit's decision allowing USA Petroleum to prove antitrust injury through pricing that is not predatory under §2 of the Sherman Act impermissibly conflicts with this Court's explicit rejection of USA Petroleum's argument "that it has suffered antitrust injury even if [its] pricing was not predatory under §2 of the Sherman Act." 495 U.S. at 339.

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PETITION FOR A WRIT OF MANDAMUS

Petitioner Atlantic Richfield Company ("ARCO") respectfully requests that a writ of mandamus issue to review the judgment and decision of the Court of Appeals for the Ninth Circuit filed on August 12, 1992, and the order of the Ninth Circuit filed on March 17, 1993, which effectively denied ARCO's request for rehearing to the extent that request was based upon the remand decision's inconsistency with this Court's mandate.

PRIOR OPINIONS

The opinion of this Court is reported at 495 U.S. 328 and appears as Appendix A to this Petition. The opinion of the Court of Appeals on remand is reported at 972 F.2d 1070 and appears as Appendix B to this Petition. The March 17, 1993 order of the Court of Appeals on

ARCO's petition for rehearing appears as Appendix C to this Petition. The initial opinion of the Court of Appeals is reported at 859 F.2d 687 and appears as Appendix D to this Petition. The District Court's unreported ruling granting ARCO summary judgment appears as Appendix E to this Petition.[1]

JURISDICTION

The Court of Appeals entered its judgment in this case on August 12, 1992. ARCO filed a timely petition for rehearing and suggestion for rehearing *en banc* on August 26, 1992. On March 17, 1993, Judges Nelson and Reinhardt of the Court of Appeals ordered that the petition be withdrawn from submission pending this Court's decision in *Liggett Group Inc. v. Brown & Williamson Tobacco Corp.*, No. 92-466 ("*Liggett*"). This Court has jurisdiction to review the judgment and order of the Court of Appeals by writ of mandamus pursuant to 28 U.S.C. §1651(a).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15, provides in relevant part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

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[1] Pursuant to Rule 29.1 of the Rules of the Supreme Court, ARCO submits as Appendix F a list of its non-wholly owned subsidiaries. All of the appendices appear in a separately bound appendix.

STATEMENT OF THE CASE

The Ninth Circuit's decision on remand is significantly more important than that court's first decision, which this Court reversed in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) ("*Atlantic Richfield*"). The first decision raised an important issue of antitrust law and policy, which this Court resolved by "declin[ing] to dilute the antitrust injury requirement . . . because we find that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price-fixing." 495 U.S. at 345. The second decision implicates all of the same, and other equally important, issues.[2] But, far eclipsing the underlying issues in importance is the utter disregard that Judges Nelson and Reinhardt show in the remand decision for this Court's opinion. They disregard both this Court's ultimate holding that "respondent has failed to meet the antitrust injury test in this case" (495 U.S. at 335) and this Court's explicit rejection of the very same argument that these Ninth Circuit judges now incredibly accept on remand. 495 U.S. at 339. Their disregard of this Court's decision is so manifest that the dissenting judge, Judge Alarcon, explained that he could not join Judges Nelson and Reinhardt because his "oath of office requires [him] to follow the mandate of the Supreme Court." 972 F.2d at 1077.

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[2] In addition to the questions presented by this mandamus petition, the decision on remand presents two important issues, which, if not rendered moot by this petition or by the Ninth Circuit on rehearing, could be reviewed on a later writ of certiorari:

1. Whether a firm can engage in predatory pricing when its market share is not large enough to create a reasonable likelihood that it will recover in the form of later monopoly profits more than the losses suffered through predatory pricing.

2. Whether the district court correctly granted summary judgment when USA Petroleum failed to make any showing on an essential element of its case (here, predatory pricing) that ARCO contended could not be proven and with respect to which USA Petroleum would have had the burden of proof at trial, but instead argued unsuccessfully that the law did not require the element.

ARCO sought rehearing and requested rehearing *en banc* because, among other reasons, the decision on remand patently disregarded this Court's mandate. By an extraordinary order filed on March 17, Judges Nelson and Reinhardt (with Judge Alarcon again dissenting) effectively rejected ARCO's argument that there was any inconsistency. (Appendix C.) Their order, by its terms, defers decision on ARCO's petition pending this Court's decision in *Liggett*. *Liggett*, however, is utterly irrelevant to ARCO's fundamental argument that these judges disregarded the Court's mandate. This simple fact makes clear that Judges Nelson and Reinhardt already have rejected ARCO's argument that this Court definitively disposed of USA Petroleum's showing on antitrust injury. They are using the vehicle of a deferral order to prevent review of their decision. This Court, however, has ample power to review by writ of mandamus the failure of these judges to follow its mandate.

Proceedings In The District Court

USA Petroleum brought this lawsuit to attack ARCO's marketing program, commenced in April 1982, under which ARCO discontinued credit cards and otherwise reduced its costs so that it could become more competitive through lower gasoline prices to the consumer. USA Petroleum's complaint alleged that ARCO implemented "severe and predatory price cuts" designed to drive USA Petroleum and other independent gasoline marketers out of the market. (Joint Appendix ("JA") 18, ¶28.)[3] USA Petroleum further alleged that ARCO's predatory pricing was intended to, and posed a danger that ARCO would, obtain control of a purported "discount market" for gasoline. (JA 20, ¶39.) USA Petroleum cast its predatory pricing claim principally as a

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[3] The Joint Appendix is that filed by ARCO and USA Petroleum when this case was initially before this Court on writ of certiorari (No. 88-1668).

Sherman Act §2 attempt-to-monopolize case. But, USA Petroleum also alleged price-fixing in violation of Sherman Act §1, because much of the gasoline sold in competition with USA Petroleum was not sold directly by ARCO, but by independent dealers with whom it allegedly conspired to charge predatory prices.

After three years of discovery, ARCO moved for summary judgment dismissing the Sherman Act §1 and §2 claims. The motion was based upon an extensive factual record showing that ARCO and its dealers could not engage in predatory pricing because they posed no real threat of acquiring monopoly power in any relevant market. ARCO argued that USA Petroleum's inability to prove predatory pricing precluded it from proving both a violation of §2 and the antitrust injury required for its §1 claim. Confronted by the motion, USA Petroleum promptly stipulated to dismiss with prejudice its Sherman Act §2 claim. (JA 76.)

ARCO then renewed its summary judgment motion directed to the §1 claim. ARCO argued that USA Petroleum could not satisfy the antitrust-injury requirement without proving predatory pricing and that it could not prove predatory pricing. ARCO offered both a legal principle and a factual showing to support the latter argument. ARCO's legal principle was that predatory pricing can occur only where the defendant has a market share large enough to threaten future monopoly prices. ARCO's factual showing established that its market share was far too low to enable it to engage in predatory pricing.

USA Petroleum decided that it would not even try to prove predatory pricing in its opposition to the summary judgment motion. Rather, USA Petroleum decided to rest its entire opposition on the argument that it was not required to prove predatory pricing to establish antitrust injury. USA Petroleum manifested this decision in a number of ways. First, its opposition to ARCO's motion

offered neither legal authorities, nor a factual record, to challenge the contention that USA Petroleum could not prove predatory pricing. Second, USA Petroleum's Statement of Genuine Issues, required under the Local Rules of the District Court to set forth "all material facts as to which it is contended there exists a genuine issue necessary to be litigated," did not identify as disputed any issue relating to predatory pricing. (JA 86-7.) Rather, it identified as the only two disputed issues: (1) whether ARCO engaged in vertical price fixing and (2) whether that price fixing injured USA Petroleum and in what amount. (*Id.*) Third, USA Petroleum's counsel at the summary judgment hearing candidly acknowledged his belief "that there is no dangerous probability of monopolization and *therefore* the idea that this price is predatory . . . even by the most liberal standard, is probably going to fail." (10/14/86 Tr. 19 (emphasis added).)[4]

The District Court rejected USA Petroleum's argument. It held: "Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the antitrust injury requirement of Clayton Act §4, without showing such prices to be predatory." (Appendix E, ¶5.) Based upon the factual record submitted by ARCO and USA Petroleum's concessions, the District Court further found that "no such showing [*i.e.*, that ARCO prices were predatory] can be made."

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[4] As demonstrated by counsel's use of the word "therefore" to link together the concepts of dangerous probability of monopolization and predatory pricing, USA Petroleum then recognized that it could challenge ARCO's showing on predatory pricing only by proving that ARCO posed a real threat of acquiring monopoly power. Knowing the impossibility of making such a showing where ARCO had at most a 17% market share, USA Petroleum abandoned its predatory pricing claim. Moreover, USA Petroleum then was confident that the courts would reject ARCO's argument that antitrust injury required USA Petroleum to prove predatory pricing, an argument its opposition described as "frivolous," "contrived" and "unprecedented." (Plaintiff's Opposition to Defendant's Motion for a Pretrial Order, at 3, 6.)

(*Id.*) Accordingly, the District Court granted ARCO summary judgment dismissing the §1 claim.

The Initial Ninth Circuit Decision

In its initial appeal to the Ninth Circuit, USA Petroleum maintained the same position on predatory pricing it had asserted below. Its Opening Brief in the Ninth Circuit, at page 1, identified as the "sole issue" on appeal whether losses from *per se* unlawful maximum price fixing constituted antitrust injury. USA Petroleum's Opening Brief, at page 6, also candidly acknowledged that it had "offered no proof on predatory pricing or dangerous probability of monopolization" in the district court. As a result, both the majority and dissenting opinions in the Ninth Circuit identified as the sole issue on appeal "whether in the absence of predatory pricing a competitor can recover damages because of a maximum resale price agreement." 859 F.2d at 689 (majority); *see* 859 F.2d at 698 (dissent).

Both opinions described this antitrust-injury issue as "difficult" and of "first impression" within the Ninth Circuit. *Id.* at 689, 698. The majority, Judges Nelson and Reinhardt, upheld USA Petroleum's position that the antitrust-injury test did not require it to prove predatory pricing. The dissent, Judge Alarcon, believed that USA Petroleum's inability (or at least unwillingness) to prove predatory pricing was fatal, because a competitor's loss of profits from vigorous, but nonpredatory, competition was not antitrust injury.

This Court's Decision

On April 7, 1989, ARCO sought review from this Court. The petition for certiorari presented a single question—whether USA Petroleum's losses from nonpredatory vertical, maximum price fixing amounted to antitrust injury.

In its brief in opposition to certiorari, USA Petroleum for the first time since the filing of the summary judgment motion contended that ARCO's prices might be predatory.

USA Petroleum further contended that the district court had not made the foundational finding that ARCO's prices were nonpredatory. USA Petroleum used these contentions to argue that the question presented was not ripe for this Court's review. (Brief In Opposition To Petition For Writ Of Certiorari, 14-15.) In its reply on certiorari, ARCO showed that the ripeness issue was a red herring. Citing the history discussed above, ARCO demonstrated that: (1) USA Petroleum had abandoned its predatory pricing claim after the filing of the summary judgment motion; (2) the district court, having been presented with no evidence to the contrary, had found that USA Petroleum could not prove predatory pricing; and (3) USA Petroleum had failed to challenge the district court's finding on appeal in the Ninth Circuit. (Reply Brief In Support Of Petition For Writ Of Certiorari, 6-8.) ARCO argued that the record foreclosed USA Petroleum from challenging the district court's finding in a future proceeding and therefore allowed this Court to "assume," as the Ninth Circuit had assumed, "that the challenged prices were not predatory." (*Id.* at 6.)

This Court granted the petition for certiorari in order to resolve a conflict between the Seventh and Ninth Circuits. 490 U.S. 1097 (1989). USA Petroleum's brief on the merits did not repeat the contention, previously made only in the opposition to certiorari, that ARCO's prices were predatory. Instead, USA Petroleum reverted to the position it had asserted in the Ninth Circuit, arguing that it did not need to prove predatory pricing. Its brief identified as a question presented: "must a competitor prove, in order to demonstrate antitrust injury, that the pricefixers . . . had a dangerous probability of successful monopolization in the interbrand market under a Sherman Act §2 standard?"

This Court reversed the Ninth Circuit. 495 U.S. 328 (1990). It ruled that a firm that "loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme" "does not suffer an 'anti-

trust injury' and . . . therefore cannot bring suit under §4 of the Clayton Act . . . ." 495 U.S. at 331.[5] The Court applied this ruling explicitly to hold that USA Petroleum "has failed to meet the antitrust-injury test in this case" and "has failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 335, 346. This Court also directly addressed USA Petroleum's question presented—whether Sherman Act §2 standards for proving predatory pricing, such as dangerous probability of successful monopolization, should govern the antitrust injury inquiry in a §1 case. *See* p. 8 above. The Court rejected USA Petroleum's position:

> "In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under §2 of the Sherman Act.
>
> We reject respondent's argument."

495 U.S. at 339. The Court reversed the judgment of the Ninth Circuit and "remanded for proceedings consistent with this opinion." *Id.* at 346.

Proceedings In The Ninth Circuit On Remand

USA Petroleum sought neither rehearing nor clarification in this Court. Instead, it filed with the Ninth Circuit a "motion for clarification," asking that court again to reverse the district court's summary judgment. The motion essentially repeated the argument, which this Court had rejected, that Sherman Act §2 concepts have no place in a Sherman Act §1 case. However, USA Petroleum recanted its prior position that predatory pricing and dangerous probability of monopolization went hand-in-hand and were both §2 concepts that had no place in a §1 case. USA Petroleum now argued that predatory pricing could exist without dangerous probabil-

[5] This Court was able to "assume that petitioner's pricing was not predatory in nature" (495 U.S. at 333 n.3) because the district court had so found and USA Petroleum had not challenged that finding in the Ninth Circuit.

ity. It asked for permission to return to the district court to try to prove this new type of predatory pricing.

Judges Nelson and Reinhardt again reversed the district court's summary judgment. 972 F.2d at 1076. By rewriting this Court's holding that "respondent has failed to meet the antitrust injury test in this case," they stated that "the Supreme Court has held that USA has standing . . . to pursue a predatory pricing claim. . . ." 972 F.2d at 1074. By distorting the record, they found that USA Petroleum had not abandoned its predatory pricing allegations in the district court and in its opening brief in the Ninth Circuit. *Id.* at 1073-74. Finally, by ignoring this Court's explicit rejection of USA Petroleum's argument "that it has suffered antitrust injury even if petitioner's pricing was not predatory under §2 of the Sherman Act," they ruled that USA Petroleum did not need to prove predatory pricing violative of §2 because "[t]o require such a showing would be tantamount to saying that a conspiracy to predate violates section 1 only if it also violates section 2." *Id.* at 1076. Based upon these rulings, they remanded to allow USA Petroleum to prove predatory pricing. However, they provided no guidance beyond stating that a predatory price is a price "below 'some appropriate measure of cost' " (972 F.2d at 1071 n.1) and suggesting that a price could be predatory "without regard to its actual or potential market effect." *Id.* at 1076.

Judge Alarcon, again in dissent, reviewed this Court's opinion and the record establishing USA Petroleum's abandonment of its predatory pricing claim. He concluded:

> "The Supreme Court ruled in a landmark decision that Judge Nelson and Judge Reinhardt erred in holding that USA had demonstrated antitrust injury on the record presented to the district court. *The same judges, after again reviewing the same record, have refused to carry out the Supreme Court's mandate.*"

972 F.2d at 1083 (emphasis added). Judge Alarcon would carry out "the mandate of the United States Supreme Court [by entering] a brief order affirming the district court's order." *Id.* at 1076.

ARCO filed a petition for rehearing and suggestion that the rehearing be *en banc*. The principal ground for the petition was that the decision on remand conflicted with the Court's mandate in *Atlantic Richfield*. ARCO also argued that the decision on remand had incorrectly defined predatory pricing, citing (among other cases) the Fourth Circuit's opinion in *Liggett* (964 F.2d 335 (4th Cir.), *cert. granted*, 113 S. Ct. 430 (1992)), and that the decision was inconsistent with prevailing summary judgment law. Incredibly, seven months after ARCO filed its petition, in another attempt to frustrate the mandate of this Court, Judges Nelson and Reinhardt, with Judge Alarcon again dissenting, issued an order withdrawing the "case" "from submission pending a decision from the Supreme Court in *Liggett*." (Appendix C.) Their citation to *Liggett* shows their rejection of ARCO's principal ground for seeking rehearing because nothing in that case possibly could have any relevance to the fundamental issue whether the decision on remand conflicts with this Court's *Atlantic Richfield* opinion. The order, however, effectively precludes review of that decision either by the Ninth Circuit *en banc* or by this Court on a petition for certiorari. In these circumstances, mandamus is the only form of relief that ARCO may seek and should be granted for reasons demonstrated below.

REASONS FOR GRANTING THE WRIT

THE DECISION ON REMAND CONFLICTS WITH THIS COURT'S DECISION IN THIS CASE

The nation's system of jurisprudence is built upon the primacy of this Court. That primacy, in turn, requires that the lower federal courts follow this Court's mandates and apply its rulings. Where a lower court fails to do so,

this Court has ample power to compel compliance: "if a lower court 'mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled . . . by a writ of mandamus to execute the mandate of this Court." *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978); *see* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* 501 (6th ed. 1986) ("the Court has indicated that mandamus is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court . . . 'does not proceed to execute the mandate, or disobeys and mistakes its meaning' "). This Court should issue a writ of mandamus to compel the Ninth Circuit to follow its mandate in this case.

A. The Ninth Circuit Decision Does Not Give Effect To This Court's Holding That USA Petroleum Failed To Meet The Antitrust-Injury Test

The Ninth Circuit has to misconstrue this Court's holding just to find that this Court had left unresolved any issue for decision. It does so by describing this "Court's decision on the merits [as holding] that USA Petroleum *could suffer antitrust injury*, but only if ARCO's prices were predatory." 972 F.2d at 1073 (emphasis added). It also states that "the Supreme Court has held that USA *has standing* only to pursue a predatory pricing claim. . . ." *Id.* at 1074 (emphasis added).

Contrary to these statements, this Court's opinion nowhere suggested that USA Petroleum "could suffer antitrust injury" or "has standing" to pursue any Sherman Act §1 claim. Instead, this Court unequivocally disposed of USA Petroleum's claim that it had satisfied the antitrust-injury test. In the paragraph summarizing its holding, the Court's opinion provided: "We . . . hold that respondent has failed to meet the antitrust injury test in this case." 495 U.S. at 335. In the concluding paragraph of the opinion, the Court repeated: "Respondent has

failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346. The holding that USA Petroleum had not demonstrated antitrust injury should have disposed of its Sherman Act §1 claim, because antitrust injury is an essential element of any private action under Sherman Act §1.

The Ninth Circuit purports to find the holding giving USA Petroleum's antitrust case new life in the following sentence: " '[a]lthough a vertical, maximum-price-fixing agreement is unlawful under §1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing.' " 972 F.2d at 1073, citing 495 U.S. at 339. This sentence does not support the Ninth Circuit's position. The sentence simply announced the standard against which this Court had measured USA Petroleum's showing on antitrust injury. USA Petroleum had failed to satisfy that standard. It had not even tried to prove predatory pricing when such a showing was required to oppose ARCO's summary judgment motion, allowing this Court (and the Ninth Circuit before it) to assume that ARCO's prices were nonpredatory. Nothing in this sentence granted USA Petroleum another shot at proving predatory pricing. Any doubt that this was so was eliminated by the Court's ultimate disposition that USA Petroleum "has failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346.[6]

In these circumstances, the Ninth Circuit was not free to rule that USA Petroleum could satisfy the antitrust-injury test. " 'Whatever was before the Court, and is dis-

[6] The Ninth Circuit's reliance on the phrase "unless it results in predatory pricing" to allow USA Petroleum another chance to prove predatory pricing is suspect for another reason. As discussed at pp. 15-17 below, the part of the opinion surrounding this phrase, which the Ninth Circuit quotes out of context, shows that this Court's references to "predatory pricing" were to pricing in violation of Sherman Act § 2. It is undisputed, even now, that ARCO's pricing did not violate Sherman Act § 2 and therefore cannot be "predatory pricing" as this Court used that phrase.

posed of, is considered as finally settled.'" *NAACP v. Alabama*, 360 U.S. 240, 244-45 (1959). The *NAACP* opinion demonstrates that this principle applies even where, as here, the Court's disposition is based upon a premise it assumed rather than decided. In its initial decision in the *NAACP* case, the Court ruled that Alabama could not constitutionally order the NAACP to produce membership lists. Based upon that ruling, the Court held constitutionally impermissible a judgment of contempt against the NAACP for failing to comply with an order requiring production of documents including the lists. The lower court decided on remand that it could re-examine the judgment of contempt because a "premise" underlying the Court's disposition—that the NAACP had "complied satisfactorily with the production order, except for the membership lists"—was mistaken. *Id.* at 243. The Court again reversed, holding that the attack on the premise came too late. *Id.* The Court noted that the respondent had accepted the premise in its statement of the issue presented and had not sought from this Court a rehearing or clarification on the ground that the decision was based on a mistaken premise. *Id.*

Similarly here, this Court disposed of the issue whether USA Petroleum satisfied the antitrust-injury test on the "premise" that ARCO's prices were nonpredatory, and USA Petroleum accepted that premise in its statement of the issue presented. Nor did USA Petroleum seek rehearing or clarification from this Court. So too should USA Petroleum now be bound by this Court's disposition against it of the antitrust-injury issue.

B. The Ninth Circuit Decision Does Not Give Effect To This Court's Statements That Antitrust Injury In A Sherman Act § 1 Case Can Be Inflicted On A Competitor Only By Pricing That Is Predatory Under Sherman Act § 2

After erroneously determining that this Court's opinion allowed it to review the merits of USA Petroleum's argument, the Ninth Circuit compounds that error by ignoring this Court's clear statements that a competitor-plaintiff in a §1 case can satisfy the antitrust-injury test only by proving predatory pricing in violation of §2.

USA Petroleum argued to the Ninth Circuit, as it had argued to this Court, that sections 1 and 2 of the Sherman Act are so different that §2 standards, such as dangerous probability of monopolization, have no place in a §1 case. The decision on remand accepts that argument:

> "To require such a showing would be tantamount to saying that a conspiracy to predate violates section 1 only if it also violates section 2. Such a holding would in essence abolish the long-standing rule that a predatory pricing conspiracy is illegal without regard to its actual or potential market effect."

972 F.2d at 1076. The decision not to require USA Petroleum to meet §2 predatory pricing standards runs afoul of this Court's opinion in two respects.[7]

Most egregiously, this Court explicitly had rejected the very same argument from USA Petroleum that the Ninth Circuit now accepts:

> "Respondent further argues that it is inappropriate to require a showing of predatory pricing before anti-

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[7] The idea that a price can be predatory "without regard to its actual or potential market effect" is also inconsistent with this Court's opinions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and their progeny in the circuit courts (including *Liggett*).

> trust injury can be established when the asserted violation is an agreement in restraint of trade illegal under §1 of the Sherman Act, rather than an attempt to monopolize prohibited by §2. USA Petroleum notes that the two sections of the Act are quite different . . . . *In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under §2 of the Sherman Act. We reject respondent's argument.*"

495 U.S. at 338-39 (emphasis added).

The conclusion on remand that the "fundamental distinction" (972 F.2d at 1074) between §2 and §1 precludes applying the §2 standard of dangerous probability of monopolization to a §1 claim is in direct conflict with the quoted language from this Court's opinion. This Court's "reject[ion]" of USA Petroleum's argument shows that a price can be "predatory" only if it is so under §2. Similarly, the footnote appended to the sentence where this Court notes that "only predatory pricing has the requisite anticompetitive effect" to inflict antitrust injury confirms the Court's understanding that a price cannot be predatory for purposes of inflicting antitrust injury on a competitor in a §1 case unless it also could be challenged under §2:

> "But because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement."

Id. at 339 n.9.

In direct conflict with this Court's statement, the decision on remand effectively dispenses with the antitrust-injury requirement. The remand decision permits a firm to challenge its rival's pricing under §1 when it could not directly challenge that pricing as predatory under §2. It accomplishes this result by confusing the distinct concepts of violation and antitrust injury. This confusion is

the second respect in which the decision on remand conflicts with this Court's opinion.

Section IV of the opinion on remand ignores antitrust injury and proceeds as though ARCO had contended that predatory pricing is an element of a §1 violation rather than part of the antitrust-injury test. The Ninth Circuit states that "[t]o rule in ARCO's favor in this case would require us to conclude that agreements to set predatory prices are not *illegal* unless dangerous probability is proven." 972 F.2d at 1076 n.6 (emphasis added). No such conclusion is required and ARCO never has contended that a dangerous probability of monopoly is required to make an agreement to fix prices illegal under §1. Such an agreement is *per se* illegal. But, the illegality of the agreement, whether *per se* or under the rule of reason, does not control the antitrust-injury issue. Indeed, this Court acknowledged that the need to show antitrust injury "is at least as great under the *per se* rule as under the rule of reason." 495 U.S. at 344. This Court also quoted Professors Areeda and Hovenkamp to the effect that " 'proof of a *per se* violation and of antitrust injury are distinct matters that must be shown independently.' " *Id.* The Ninth Circuit, however, once again overlooks this distinctness (and this Court's mandate) and repeats its error of confusing antitrust injury with illegality.

CONCLUSION

For the foregoing reasons, a writ of mandamus should issue to compel the Ninth Circuit and Judges Nelson and Reinhardt to follow this Court's mandate.

Respectfully submitted,

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92-1014

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No. 92-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IN RE ATLANTIC RICHFIELD COMPANY,
Petitioner.

Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit and the Honorable Dorothy W. Nelson and Stephen Reinhardt, Judges, United States Court of Appeals for the Ninth Circuit

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APPENDIX TO PETITION FOR A WRIT OF MANDAMUS

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 88-1668

ATLANTIC RICHFIELD COMPANY,
Petitioner

v.

USA PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[May 14, 1990]

JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether a firm incurs an "injury" within the meaning of the antitrust laws when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme. We hold that such a firm does not suffer an "antitrust injury" and that it therefore cannot bring suit under §4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. §15.[1]

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[1] Section 4 of the Clayton Act is a remedial provision that makes available treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

I

Respondent USA Petroleum Company (USA) sued petitioner Atlantic Richfield Company (ARCO) in the United States District Court for the Central District of California, alleging the existence of a vertical, maximum price-fixing agreement prohibited by §1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §1, an attempt to monopolize the local retail gasoline sales market in violation of §2 of the Sherman Act, 15 U.S.C. §2, and other misconduct not relevant here. Petitioner ARCO is an integrated oil company that, *inter alia,* markets gasoline in the western United States. It sells gasoline to consumers both directly through its own stations and indirectly through ARCO-brand dealers. Respondent USA is an independent retail marketer of gasoline which, like other independents, buys gasoline from major petroleum companies for resale under its own brand name. Respondent competes directly with ARCO dealers at the retail level. Respondent's outlets typically are low-overhead, high-volume "discount" stations that charge less than stations selling equivalent quality gasoline under major brand names.

In early 1982, petitioner ARCO adopted a new marketing strategy in order to compete more effectively with discount independents such as respondent.[2] Petitioner encouraged its dealers to match the retail gasoline prices offered by independents in various ways; petitioner made available to its dealers and distributors such short-term discounts as "temporary competitive allowances," and "temporary volume allowances," and it reduced its dealers' costs by, for example, eliminating credit-card sales. ARCO's strategy increased its sales and market share.

---

[2] Because the case comes to us on review of summary judgment, " 'inferences to be drawn from the underlying facts . . . must be viewed in 'the light most favorable to the party opposing the motion.' " *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (quoting *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962)).

In its amended complaint, respondent USA charged that ARCO engaged in "direct head-to-head competition with discounters" and "drastically lowered its prices and in other ways sought to appeal to price-conscious consumers." First Amended Complaint ¶ 19, App. 15. Respondent asserted that petitioner conspired with retail service stations selling ARCO brand gasoline to fix prices at below-market levels: "Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among ARCO-branded dealers has been eliminated by agreement, and the retail price of ARCO-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels." ¶27, App. 17. Respondent alleged that petitioner "has solicited its dealers and distributors to participate or acquiesce in the conspiracy and has used threats, intimidation and coercion to secure compliance with its terms." ¶37, App., at 19. According to respondent, this conspiracy drove many independent gasoline dealers in California out of business. ¶39, App. 20. Count one of the amended complaint charged that petitioner's vertical, maximum price-fixing scheme constituted an agreement in restraint of trade and thus violated §1 of the Sherman Act. Count two, later withdrawn with prejudice by respondent, asserted that petitioner had engaged in an attempt to monopolize the retail gasoline market through predatory pricing in violation of §2 of the Sherman Act.[3]

---

[3] The District Court granted petitioner's motion to dismiss the § 2 claim as originally pleaded. 577 F. Supp. 1296, 1304 (1983). Respondent subsequently amended its § 2 claim, but shortly after petitioner filed for summary judgment, respondent voluntarily dismissed that claim with prejudice. See App. 76-78. The Court of Appeals framed the issue as "whether a competitor's injuries resulting from vertical, *non-predatory*, maximum price fixing fall within the category of 'antitrust injury.'" 859 F.2d 687, 689 (CA9 1988) (emphasis added). For purposes of this case we likewise assume that petitioner's pricing was not predatory in nature.

The District Court granted summary judgment for ARCO on the §1 claim. The court stated that "[e]ven assuming that [respondent USA] can establish a vertical conspiracy to maintain low prices, [respondent] cannot satisfy the 'antitrust injury' requirement of Clayton Act §4, without showing such prices to be predatory." App. to Pet. for Cert. 3b. The court then concluded that respondent could make no such showing of predatory pricing because, given petitioner's market share and the ease of entry into the market, petitioner was in no position to exercise market power.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 859 F.2d 687 (1988). Acknowledging that its decision was in conflict with the approach of the Court of Appeals for the Seventh Circuit in several recent cases.[4] see *id.*, at 697, n. 15, the Ninth Circuit nonetheless held that injuries resulting from vertical, nonpredatory, maximum price-fixing agreements could constitute "antitrust injuries resulting from vertical, nonpredatory, maximum price-fixing agreements could constitute "antitrust injury" for purposes of a private suit under §4 of the Clayton Act. The court reasoned that any form of price-fixing contravenes Congress' intent that "market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail." *Id.*, at 693. The court believed that the key inquiry in determining whether respondent suffered an "antitrust injury" was whether its losses "resulted from a disruption . . . in the . . . market caused by the . . . antitrust violation." *Ibid.* The court concluded that "[i]n the present case, the inquiry seems straightforward: USA's claimed injuries were the direct result, and indeed, under the allegations we accept as true, the intended objective, of ARCO's

---

[4] See *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1418-1420 (CA7 1989); *Local Beauty Supply, Inc.* v. *Lamaur, Inc.*, 787 F.2d 1197, 1201-1203 (CA7 1986); *Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698, 708-709 (CA7), cert. denied, 469 U.S. 1018 (1984).

price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries." *Ibid.*

We granted certiorari, 490 U.S. —— (1989).

II

A private plaintiff may not recover damages under §4 of the Clayton Act merely by showing "injury causally linked to an illegal presence in the market." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Instead, a plaintiff must prove the existence of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Ibid.* (emphasis in original). In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), we reaffirmed that injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny, "since '[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition." *Id.*, at 109-110 (quoting *Brunswick, supra*, at 488). See also *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U.S. 519, 539-540 (1983); *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 483, and n. 19 (1982); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

Respondent argues that, as a competitor, it can show antitrust injury from a vertical conspiracy to fix maximum prices that is unlawful under §1 of the Sherman Act, even if the prices were set above predatory levels. In addition, respondent maintains that any loss flowing from a *per se* violation of §1 automatically satisfies the antitrust injury requirement. We reject both contentions and hold that respondent has failed to meet the antitrust injury test in

this case. We therefore reverse the judgment of the Court of Appeals.

A

In *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), we found that a vertical, maximum price-fixing scheme was unlawful *per se* under §1 of the Sherman Act because it threatened to inhibit vigorous competition by the dealers bound by it and because it threatened to become a minimum price-fixing scheme.[5] That case concerned a newspaper distributor who sought to charge his customers more than the suggested retail price advertised by the publisher. After the publisher attempted to discipline the distributor by hiring another carrier to take away some of the distributor's customers, the distributor brought suit under §1. The Court found that "the combination formed by the [publisher] in this case to force [the distributor] to maintain a specified price for the resale of newspapers which he had purchased from [the publisher] constituted, without more, an illegal restraint of trade under §1 of the Sherman Act." *Id.*, at 153.

In holding such a maximum-price vertical agreement illegal, we analyzed the manner in which it might restrain competition by dealers. First, we noted that such a scheme, "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." *Id.*, at 152. We further explained that "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Id.*, at 152-153. By limiting the ability of small dealers to engage in nonprice competition, a maximum price-fixing agreement might "channel distribution through a few large or specifically advantaged

[5] We assume, *arguendo*, that *Albrecht* correctly held that vertical, maximum price-fixing is subject to the *per se* rule.

dealers." *Id.*, at 153. Finally, we observed that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Ibid.*

Respondent alleges that it has suffered losses as a result of competition with firms following a vertical, maximum price-fixing agreement. But in *Albrecht* we held such an agreement *per se* unlawful because of its potential effects on dealers and consumers, not because of its effect on *competitors*. Respondent's asserted injury as a competitor does not resemble any of the potential dangers described in *Albrecht*.[6] For example, if a vertical agreement fixes "[m]aximum prices . . . too low for the dealer to furnish services" desired by consumers, or in such a way as to channel business to large distributors, *id.*, at 152-153, then a firm dealing in a competing brand would not be harmed. Respondent was *benefitted* rather than harmed if petitioner's pricing policies restricted ARCO sales to a few large dealers or prevented petitioner's dealers from offering services desired by consumers such as credit card sales. Even if the maximum price agreement ultimately had acquired all of the attributes of a minimum price-fixing scheme, respondent still would not have suffered antitrust injury because higher ARCO prices would have worked to USA's advantage. A competitor "may not

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[6] *Albrecht* is the only case in which the Court has confronted an unadulterated vertical, maximum price-fixing arrangement. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), we also suggested that such an arrangement was illegal because it restricted vigorous competition among dealers. The restraint in *Kiefer-Stewart* had an additional horizontal component, however, see *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 348, n. 18 (1982), since the agreement was between two suppliers that had agreed to sell liquor only to wholesalers adhering to "maximum prices above which the wholesalers could not resell." *Kiefer-Stewart, supra*, 340 U.S., at 212.

complain of conspiracies that . . . set minimum prices at *any* level." *Matsushita Electric Industrial Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585, n. 8 (1986); see also *id.*, at 582-583 ("respondents [cannot] recover damages for any conspiracy by petitioners to charge higher than competitive prices in the . . . market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price . . ."). Indeed, the gravamen of respondent's complaint—that the price-fixing scheme between petitioner and its dealers enabled those dealers to increase their sales—amounts to an assertion that the dangers with which we were concerned in *Albrecht* have *not* materialized in the instant case. In sum, respondent has not suffered "*antitrust* injury," since its losses do not flow from the aspects of vertical, maximum price-fixing that render it illegal.

Respondent argues that even if it was not harmed by any of the anticompetitive effects identified in *Albrecht*, it nonetheless suffered antitrust injury because of the low prices produced by the vertical restraint. We disagree. When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation.[7] A firm complaining about the harm

[7] The Court of Appeals implied that the antitrust injury requirement could be satisfied by a showing that the "long-term" effect of the maximum price agreements could be to eliminate retailers and ultimately to reduce competition. 859 F.2d at 694, 696. We disagree. Rivals cannot be excluded in the long run by a nonpredatory maximum price scheme unless they are relatively inefficient. Even if that were false, however, a firm cannot claim antitrust injury from nonpredatory price competion on the asserted ground that it is "ruinous." Cf. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610-612 (1972); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221 (1940). "[T]he statutory policy precludes inquiry into the question whether competition is good or bad." *National*

it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." Blair & Harrison, Rethinking Antitrust Injury, 42 Vand. L. Rev. 1539, 1554 (1989). This is not *antitrust* injury; indeed, "cutting prices in order to increase business often is the very essence of competition." *Matsushita supra*, at 594. The antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) (emphasis in original). "To hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Cargill*, 479 U.S., at 116.

Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under §1 of the Sherman Act, rather than an attempt to monopolize prohibited by §2. Respondent notes that the two sections of the Act are quite different. Price-fixing violates §1, for example, even if a single firm's decision to price at the same level would not create §2 liability. See generally *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-769 (1984). In a §1 case, the price agreement itself is illegal, and respondent contends that all losses flowing from such an agreement must by definition constitute "antitrust injuries." Respondent observes that §1 in general and the *per se* rule in particular are grounded " 'on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' " *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 348 (1982) (quoting Rahl, Price, Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U. L. Rev. 137, 142

Society of Professional Engineers v. *United States*, 435 U.S. 679, 695 (1978).

(1962)). In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under §2 of the Sherman Act.

We reject respondent's argument. Although a vertical, maximum price-fixing agreement is unlawful under §1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing.[8] Antitrust injury does not arise for purposes of §4 of the Clayton Act, see n. 1, *supra*, until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct, see *Brunswick*, 429 U.S., at 487; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect.[9] See Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697,

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[8] The Court of Appeals erred by reasoning that respondent satisfied the antitrust injury requirement by alleging that "[t]he removal of some elements of price competition distorts the markets, and harms all the participants." 859 F.2d, at 694. Every antitrust violation can be assumed to "disrupt" or "distort" competiiton. "[O]therwise, there would be no violation." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 340.3b, p. 411 (1989 Supp.). Respondent's theory would equate injury in fact with antitrust injury. We declined to adopt such an approach in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat.*, 429 U.S. 477 (1977), and *Cargill Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and we reject it again today. The antitrust injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity. Although all antitrust violations, under both the *per se* rule and rule-of-reason analysis, "distort" the market, not every loss stemming from a violation counts as antitrust injury.

[9] This is not to deny that a vertical price-fixing scheme may facilitate predatory pricing. A supplier, for example, can reduce its prices to its own downstream dealers and share the losses with them, while forcing competing dealers to bear by themselves the full loss imposed by the lower prices. Cf. *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 522 (1963). But because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement.

697-699 (1975); McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 292-294 (1980). Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

We have adhered to this principle regardless of the type of antitrust claim involved. In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, *supra*, for example, we found that a plaintiff competitor had not shown antitrust injury and thus could not challenge a merger that was assumed to be illegal under §7 of the Clayton Act, even though the merged company threatened to engage in vigorous price competition that would reduce the plaintiff's profits. We observed that nonpredatory price competition for increased market share, as reflected by prices that are below "market price" or even below the costs of a firm's rivals, "is not activity forbidden by the antitrust laws." 479 U.S., at 116. Because the prices charged were not predatory, we found no antitrust injury. Similarly, we determined that antitrust injury was absent in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, even though the plaintiffs alleged that an illegal acquisition threatened to bring a " 'deep pocket' parent into a market of 'pygmies,' " *Id.*, at 487, a scenario that would cause the plaintiffs economic harm. We opined nevertheless that "if [the plaintiffs] were injured, it was not 'by reason of anything forbidden in the antitrust laws': while [the plaintiffs'] loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." *Id.*, at 488. To be sure, the source of the price competition in the instant case was an agreement allegedly unlawful under §1 of the Sherman Act rather than a merger in violation of §7 of the Clayton Act. But that difference is not salient. When prices are not predatory, any losses flowing from them cannot be said to stem from an *anti-*

competitive aspect of the defendant's conduct.[10] "'It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'" *Cargill*, 479 U.S., at 116 (quoting *Arthur S. Langenderfer, Inc.* v. *S. E. Johnson Co.*, 729 F.2d 1050, 1057 (CA6), cert. denied, 469 U.S. 1036 (1984)).[11]

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[10] We did not reach a contrary construction in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), where we declined to define precisely the term "predatory pricing" but stated instead that "[f]or purposes of this case it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Id.*, at 585, n. 8. This statement does not imply that losses from *non*predatory pricing might qualify as antitrust injury; we were quite careful to limit our discussion in that case to *predatory* pricing. See *ibid.* (nonpredatory prices would not cause antitrust injury because they would "leave respondents in the same position as would market forces"). We noted that "[e]xcept for the alleged conspiracy to monopolize the . . . market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an 'antitrust injury.'" *Id.*, at 586. We also observed that "respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury." *Id.*, at 584, n. 7 (citations omitted); see also *id.*, at 594; *Cargill*, *supra*, at 117, n. 12 (interpreting our decision in *Matsushita*). We have no occasion in the instant case to consider the proper definition of predatory pricing, nor to determine whether our dictum in *Matsushita* that predatory pricing might consist of "pricing below the level necessary to sell [the offender's] products," 475 U.S., at 585, n. 8, is an accurate statement of the law. See n. 3, *supra*.

[11] The Court of Appeals purported to distinguish *Cargill* and *Brunswick* on the ground that those cases turned on an "attenuated or indirect" relationship between the alleged violation—the illegal merger—and the plaintiffs' injury. 859 F.2d, at 695. We disagree. The Court in both cases described the injury as flowing directly from the alleged antitrust violation. See *Cargill*, 479 U.S., at 108; *Brunswick*, 429 U.S., at 487.

B

We also reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved. The *per se* rule is a method of determining whether §1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under §4 of the Clayton Act. *Per se* and rule-of-reason analysis are but two methods of determining whether a restraint is "unreasonable," *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects.[12] The *per se* rule is a presumption of unreasonableness based on "business certainty and litigation efficiency." *Arizona* v. *Maricopa County Medical Society*, 457 U.S., at 344. It represents a "long-standing judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U.S. ——, —— (1990) (slip op. at 20) (quoting *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 16 (1984)). "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Maricopa County Medical Society*, *supra*, at 344.

The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that

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[12] "Both *per se* rules and the Rules of Reason are employed 'to form a judgment about the competitive significance of the restraint.'" *National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 103 (1984) (quoting *National Society of Professional Engineers* v. *United States*, 435 U.S., at 692). "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition." 468 U.S., at 104.

stem from competition from supporting suits by private plaintiffs for either damages or equitable relief. Actions *per se* unlawful under the antitrust laws may nonetheless have *some* procompetitive effects, and private parties might suffer losses therefrom.[13] See *Maricopa County*

[13] When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist. The manufacturer acts not out of altruism, of course, but out of a desire to increase its own sales, whereas the dealer's incentive, like that of any monopolist, is to reduce output and increase price. If an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors. Vertical, maximum price-fixing thus may have procompetitive interbrand effects even if it is *per se* illegal because of its potential effects on dealers and consumers. See *Albrecht* v. *Herald Co.*, 390 U.S. 145, 159 (1968) (Harlan, J., dissenting) (maximum price ceilings "do not lessen horizontal competition" but instead "drive prices toward the level that would be set by intense competition," by "prevent[ing] retailers or wholesalers from reaping monopoly or supercompetiitve profits"). Indeed, we acknowledged in *Albrecht* that "[m]aximum and minimum price fixing may have different consequences in many situations." *Id.*, at 152. The procompetitive potential of a vertical maximum price restraint is more evident now than it was when *Albrecht* was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful *per se* in 1968. See *id.*, at 154; *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375-376 (1967). These agreements are currently subject only to rule-of-reason scrutiny, making monopolistic behavior by dealers more likely. See *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47-59 (1977).

Many commentators have identified procompetitive effects of vertical, maximum price-fixing. See, *e.g.*, P. Areeda & H. Hovenkemp, Antitrust Law ¶ 340.3b, p. 378, n. 24 (1988 Supp.); Blair & Harrison, Rethinking Antitrust Injury, 42 Vand. L. Rev. 1539, 1553 (1989); Blair & Schafer, Evolutionary Models of Legal Change and the *Albrecht* Rule, 32 Antitrust Bull. 989, 995-1000 (1987); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, part 2, 75 Yale L.J. 373, 464 (1966); Easterbrook; Maximum Price Fixing, 48 U. Chi. L. Rev. 886, 887-890 (1981);

Medical Society, *supra*, at 351; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50, n. 16 (1977). Conduct in violation of the antitrust laws may have three effects, often interwoven: in some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from an competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason. Indeed, insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored. "[P]rocompetitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws may cause serious harm to individuals, but this kind of harm is the essence of competition and should play no role in the definition of antitrust damages." Page, The Scope of Liability for Antitrust Violations, 37 Stan. L. Rev. 1445, 1460 (1985). Thus, "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." P. Areeda & H. Hovenkamp, Antitrust Law ¶334.2c, p. 330 (1989 supp.).

For this reason, we have previously recognized that even in cases involving *per se* violations, the right of action under §4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury. For example, in a case involving horizontal price-fixing, "perhaps the paradigm of an unreasonable restraint of trade," *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 (1984), we observed that the

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Hovenkamp, Vertical Integration by the Newspaper Monopolist, 69 Iowa L. Rev. 451, 452-456 (1984); Polden, Antitrust Standing and the Rule Against Resale Price Maintenance, 37 Cleveland State L. Rev. 179, 216-217 (1989); Turner, The Durability, Relevance, and Future of American Antitrust Policy, 75 Calf. L. Rev. 797, 803-804 (1987).

plaintiffs were still required to "show that the conspiracy caused *them* an injury for which the antitrust laws provide relief." *Matsushita*, 475 U.S., at 584, n. 7 (citing *Brunswick*) (emphasis added). Similarly, in *Associated General Contractors of California, Inc.* v. *Carpenter*, 459 U.S. 519 (1983), we noted that a restraint of trade was illegal *per se* in the sense that it could "be condemned even without proof of its actual market effect," but we maintained that even if it "may have been unlawful, it does not, of course, necessarily follow that still another party . . . is a person injured by reason of a violation of the antitrust laws within the meaning of §4 of the Clayton Act." *Id.*, at 528-529.

C

We decline to dilute the antitrust injury requirement here because we find that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price-fixing. If such a scheme causes the anticompetitive consequences detailed in *Albrecht*, consumers and the manufacturers' own dealers may bring suit. The "existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Associated General Contractors*, 459 U.S., at 542.

Respondent's injury, moreover, is not "inextricably intertwined" with the antitrust injury that a dealer would suffer, *McCready*, 457 U.S., at 484, and thus does not militate in favor of permitting respondent sue on behalf of petitioner's dealers. A competitor is not injured by the *anticompetitive* effects of vertical, maximum price-fixing, see *supra*, at ——, and does not have any incentive to vindicate the legitimate interests of a rival's dealer. See Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 33-39 (1984). A competitor will not bring suit to protect the dealer against a maximum price that is set too low, inasmuch as the competitor would *benefit* from

such a situation. Instead, a competitor will be motivated to bring suit only when the vertical restraint promotes interbrand competition between the competitor and the dealer subject to the restraint. See n. 13, *supra*. In short, a competitor will be injured and hence motivated to sue only when a vertical, maximum price-fixing arrangement has a *procompetitive* impact on the market. Therefore, providing the competitor a cause of action would not protect the rights of dealers and consumers under the antitrust laws.

III

Respondent has failed to demonstrate that it has suffered any antitrust injury. The allegation of a *per se* violation does not obviate the need to satisfy this test. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 88-1668

ATLANTIC RICHFIELD COMPANY,
Petitioner

v.

USA PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[May 14, 1990]

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

The Court today purportedly defines only the contours of antitrust injury that can result from a vertical, nonpredatory, maximum price-fixing scheme. But much, if not all, of its reasoning about what constitutes injury actionable by a competitor would apply even if the alleged conspiracy had been joined by other major oil companies doing business in California, as well as their retail

outlets.[1] The Court undermines the enforceability of a substantive price-fixing violation with a flawed construction of §4, erroneously assuming that the level of a price fixed by a §1 conspiracy is relevant to legality and that all vertical arrangements conform to a single model.

I

Because so much of the Court's analysis turns on its characterization of USA's cause of action, it is appropriate to begin with a more complete description of USA's theory. As the case comes to us on review of summary judgment, we assume the truth of USA's allegation that ARCO conspired with its retail dealers to fix the price of gas at specific ARCO stations that compete directly with USA stations. It is conceded that this price-fixing conspiracy is a *per se* violation of §1 of the Sherman Act.

USA's theory can be expressed in the following hypothetical example: In a free market ARCO's advertised gas might command a price of $1.00 per gallon while USA's unadvertised gas might sell for a penny less, with retailers of both brands making an adequate profit. If, however, the ARCO stations reduce their price by a penny or two, they might divert enough business from USA stations to force them gradually to withdraw from the market.[2] The fixed price would be lower than the

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[1] For example, the Court reasons:

"Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." *Ante*, at 10.

. . . .

"When prices are not predatory, any losses flowing from them cannot be said to stem from an *anticompetitive* aspect of the defendant's conduct." *Ante*, at 11.

[2] "31. Arco and its co-conspirators have engaged in limit pricing practices in which prices are deliberately set on gasoline at a level below their competitors' cost with the purpose and effect of making it impossible for plaintiff and other independents to compete. For

price that would obtain in a free market, but not so low as to be "predatory" in the sense that a single actor could not lawfully charge it under 15 U.S.C. §2 or §13a.[3]

This theory rests on the premise that the resources of the conspirators, combined and coordinated, are sufficient to sustain below-normal profits in selected localities long enough to force USA to shift its capital to markets where it can receive a normal return on its investment.[4] Thus, during the initial period of competitive struggle between the conspirators and the independents, consumers will presumably benefit from artificially low prices. If the alleged campaign is successful, however—and as the case comes to us we must assume it will be—in the long run there will be less competition, or potential competition, from independents such as USA, and the character of the market will be different than if the conspiracy had never taken place. USA alleges that, in fact, the independent market already has suffered significant losses.[5]

example, Arco and its co-conspirators have sold gasoline, ex tax, at the retail pump for less than independents, such as plaintiff, can purchase gasoline at wholesale." Amended Complaint, App. 18.

[3] "27. Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels. . . ." Amended Complaint, App. 17.

[4] It may be that ARCO could have accomplished its objectives independently, merely by reducing its own prices sufficiently to induce its retail customers to charge abnormally low prices and divert business from USA stations. See, *e.g.*, ¶ 30, App. 18. Such independent action by ARCO, followed by independent action by its retail customers, of course would be lawful, even if it produced the same consequenecs as the alleged conspiratorial program. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). Indeed, a full trial might establish that that is what happened. Nevertheless, as the case comes to us, we assume that ARCO is the architect of an illegal conspiracy.

[5] "18. For the last few years, there has been, and still is, a steady and continuous reduction in the competitive effectiveness of in-

II

ARCO's alleged conspiracy is a naked price restraint in violation of §1 of the Sherman Act, 15 U.S.C. §1.[6] It is undisputed that ARCO's price fixing arrangement, as alleged, is illegal *per se* under the rule against maximum price fixing, which is "grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' Rahl, Price Competition and the Price Fixing Rule—Preface and Perspective, 57 Nw. U. L. Rev. 137, 142 (1962)." *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 348 (1982). At issue is only whether a maximum price, administered on a host of retail stations that are ostensibly competing with one another as well as with other retailers, may be challenged by the competitor targeted by the price scheme.

Section 4 of the Clayton Act allows private enforcement of the antitrust laws by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §15. See *Simpson* v. *Union Oil Co. of California*, 377 U.S. 13, 16 (1964) (quoting *Radovich* v. *National Football League*,

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dependent refiners and marketers selling in California and the western United States. During this time period, more than a dozen large independents have sold out, liquidated or drastically curtailed their operations, and many independent retail stations have been closed. The barriers to entry into this market have been high, and today such barriers are effectively insurmountable; once an independent is eliminated, it is highly unlikely that it will be replaced." Amended Complaint, App. 15.

[6] We have long held under the Sherman Act that "a combination for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223 (1940). See also *Kiefer-Stewart Co.* v. *Joseph E. Seagrams & Sons, Inc.*, 340 U.S. 211, 213 (1951) (maximum resale prices); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) (vertical resale prices); *Albrecht* v. *Herald Co.*, 390 U.S. 415 (1968) (vertical maximum resale prices).

352 U.S. 445, 454 (1957)) (laws allowing private enforcement of the antitrust laws by an aggrieved party " 'protect the victims of the forbidden practices as well as the public.' "). In order to invoke §4, a plaintiff must prove that it suffered an injury that (1) is "of the type the antitrust laws were intended to prevent" and (2) "flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In *Brunswick*, the plaintiff businesses claimed that they were deprived of the benefits of the increased concentration that would have resulted had failing businesses not been acquired by petitioner, allegedly in violation of §7. In concluding that the plaintiffs had failed to prove "antitrust injury," we found that neither condition of §4 standing was satisfied: first, the plaintiffs sought to recover damages because the mergers had preserved businesses and competition, which is not the type of injury that the antitrust laws are designed to prevent; and second, the plaintiffs had not been harmed by any potetnial change in the market structure effected by the entry of the " 'deep pocket' parent." *Id.*, at 487-488.

In this case, however, both conditions of standing are met. First, §1 is intended to forbid price-fixing conspiracies that are designed to drive competitors out of the market. See *Klor's* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (illegal coordination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy"). USA alleges that ARCO's pricing scheme aims at forcing independent refiners and marketers out of business and has created "an immediate and growing probability that the independent segment of the industry will be destroyed altogether." [7]

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[7] USA's Amended Complaint specifically alleges:

"39. As a direct and proximate result of the above-described combinations and conspiracy and of the acts taken in furtherance thereof:

In *Brunswick*, we recognized that requiring a competitor to show that its loss is "of the type" antitrust laws were intended to prevent

> "does not necessarily mean . . . that §4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Brunswick*, 429 U.S., at 489, n.14.

The pricing behavior in the Court's hypothetical example may cause actionable injury because it is "predatory." This is so because the Court assumes that a predatory price is illegal. The direct relationship between the illegality and the harm is what makes the competitor's short-term loss "antitrust injury." The fact that the illegality in the case before us today stems from the illegal conspiracy, rather than the predatory character of the price, does not change the analysis of "that which makes defendants' act unlawful." [8] Thus, notwithstanding any tem-

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"(a) the price of gasoline has been artifically fixed, maintained and stabilized;

"(b) independent refiners and marketers have suffered substantial losses of sales and profits and their ability to compete has been seriously impaired;

"(c) independent refiners and marketers have gone out of business or been taken over by Arco;

"(d) there is an immediate and growing probability that the independent segment of the industry will be destroyed altogether and that control of the discount market will be acquired by Arco." App. 20.

[8] *Brunswick*, 429 U.S., at 489. The analysis in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), also supports this conclusion. There, the respondent alleged "antitrust injury" on alternative theories: first, that after the challenged merger petitioners' company would be able to lower its prices because it would

porary benefit to consumers, the unlawful pricing practice that is harmful in the long run to competition causes "antitrust injury" for which a competitor may seek damages.[9]

Second, USA is directly and immediately harmed by this price-fixing scheme, that is to say, by "that which makes defendants' acts unlawful." *Id.*, at 489. In *Brunswick*, the allegedly illegal conduct at issue—the merger—itself did not harm the plaintiffs; similarly, in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), the alleged injury arose not from the illegality of the proposed merger, but merely from possible postmerger behavior. Although the link between the illegal *mergers* and the alleged harms was insufficient to prove antitrust injury in either *Brunswick* or *Cargill*, both of those cases recognize that illegal *pricing practices* may cause competitors "antitrust injury".[10]

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be more efficient; and second, that it might attempt to drive respondent out of business by engaging in sustained predatory pricing. We rejected the first theory because *independent* decisions to reduce prices based on efficiencies are legal, and precisely what the antitrust laws are intended to encourage. *Id.*, at 116-117. We rejected the second theory because respondent "neither raised nor proved any claim of predatory pricing before the District Court." *Id.*, at 119. However, in discussing the second theory, we recognized that predatory pricing "is a practice that harms both competitors *and* competition," and because it aims at "the elimination of competition. . . . is thus a practice 'inimical to the purposes of [the antitrust] laws,' *Brunswick*, 429 U.S., at 488, and one capable of inflicting antitrust injury." *Id.*, at 117-118 (footnote omitted). Again, a competitor suffers the same "antitrust injury" from an illegal conspiracy setting prices designed to eliminate it as it would suffer from a single firm setting predatory prices.

[9] See also Blair & Harrison, Rethinking Antitrust Injury, 42 Vand. L. Rev. 1539, 1561-1565 (1989) (unsuccessful predatory efforts cause "antitrust injury" even though consumers have not suffered).

[10] I agree that not *every* loss that is causally related to an antitrust violation is "antitrust injury," *ante*, at 9, n. 8, but a scheme that prices the services of conspirators below those of competitors

The Court accepts that, as alleged, the vertical price-fixing scheme by ARCO is *per se* illegal under §1. Nevertheless, it denies USA standing to challenge the arrangement because it is neither a consumer, nor a dealer in the vertical arrangement, but only a competitor of ARCO: the "antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'" *Ante*, at 8 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). This proposition—which is often used as a test of whether a violation of law occurred—cannot be read to deny all remedial actions by competitors. When competitors are injured by illicit agreements among their rivals rather than by the free play of market forces, the antitrust laws protect competitors precisely for the purpose of protecting competition. The Court nevertheless interprets the proposition as categorically excluding actions by a competitor who suffers when other charge "non-predatory prices pursuant to a vertical, maximum price-fixing scheme." *Ante*, at 1. In the context of a §1 violation, however, the distinctions both of the price level and of the vertical nature of the conspiracy are unfounded. Each of these two analytical errors merits discussion.

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may cause injury for which the competitor may recover damages under § 4. In *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), the presumed injury to competitors was strong enough to support even an indirect action by a patient of the competitor. Petitioners, a medical insurance company and an organization of psychiatrists, conspired in violation of § 1 to compensate patients for the services of psychiatrists, but not those of psychologists. We recognized that if patients had chosen to go to psychiatrists, the "antitrust injury would have been borne in the first instance by the [psychologist] competitors of the conspirators." *Id.*, at 483. Instead, patient McCready went to a psychologist at her own expense. We held that "[a]lthough McCready was not a competitor of the injury she suffered was inextricably intertwined with the injury the conspirtaors sought to inflict on the psychologists and the psychotherapy market." *Id.*, at 483-484.

III

The Court limits its holding to cases in which the noncompetitive price is not "predatory," *ante*, at 1, 5, 9, 11, essentially assuming that any nonpredatory price set by an illegal conspiracy is lawful, see n. 1, *supra*. This is quite wrong. Unlike the prohibitions against monopolizing or underselling in violation of §2 or §13a, the gravamen of the price-fixing conspiracy condemned by §1 is unrelated to the level of the administered price at any particular point in time. A price fixed by a single seller acting independently may be unlawful because it is predatory, but the reasonableness of the price set by an illegal conspiracy is wholly irrelevant to whether the conspirators' work product is illegal.

If any proposition is firmly settled in the law of antitrust, it is the rule that the reasonableness of the particular price agreed upon by defendants does not constitute a defense to a price-fixing charge.[11] In *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927), the Court explained that "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow," *id.*, at 397, and cautioned that:

> "in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a

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[11] See *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927); see also *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 291 (CA6 1898) ("the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly").

> determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." *Id.*, at 398.

See also *United States* v. *Masonite Corp.*, 316 U.S. 265, 281-282 (1942). This reasoning applies with equal force to a rule that provides conspirators with a defense if their agreed upon prices are nonpredatory, but no defense if their prices fall below the elusive line that defines predatory pricing.[12] By assuming that the level of a price is relevant to the inquiry in a §1 conspiracy case, the Court sets sail on the "sea of doubt" that Judge Taft condemned in his classic opinion in the *Addyston Pipe and Steel* case:

> "It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-284 (CA6 1898).

IV

The Court is also careful to limit its holding to cases involving "vertical" price-fixing agreements. In a thinly

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[12] Like the determination of a "reasonable" price, determination of what is a "predatory price" is far from certain. The Court declines to define predatory pricing for the purpose of the § 4 inquiry it creates today, *ante*, at 11, n. 10. Predatory pricing by a conspiracy, rather than a single actor, may result from more than pricing below an appropriate measure of cost. See *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585, n. 8 (1986). See also *A. A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1400 (CA7 1989) (describing the many considerations in a single firm case that make it difficult to infer predatory conduct from the relation of price to cost).

veiled circumscription of the substantive reach of §1, the Court simply interprets "antitrust injury" under §4 so that it excludes challenges by any competitor alleging a vertical conspiracy: "[A] vertical price-fixing scheme may facilitate predatory pricing . . . . [b]ut because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement." *Ante*, at 10, n. 9.[13] This focus on the vertical character of the agreement is misleading because it incorrectly assumes that there is a sharp distinction between vertical and horizontal arrangements, and because it assumes that all vertical arrangements affect competition in the same way.

The characterization of ARCO's price-fixing arrangement as "vertical" does not limit its potential consequences to a neat category of injuries. A horizontal conspiracy among ARCO retailers administered by, for example, trade association executives instead of executives of their common supplier would generate exactly the same anti-competitive consequences. ARCO and its retail dealers all share an interest in excluding independents like USA from the market. The fact that each member of a group of price-fixers may have made a separate, individual agreement with their common agent does not destroy the horizontal character of the agreement. We so held in the *Masonite* case:

> "[T]here can be no doubt that this is a price-fixing combination which is illegal *per se* under the Sherman Act. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 [1927]; *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436 [1940]; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 [1940].

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[13] Thus, a victim of a vertical maximum price-fixing conspiracy that is successfully driving it from the market cannot bring an action under § 1 as long as the conspirators take care to fix their prices at "nonpredatory" levels.

> That is true though the District Court found that, in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others. . . . Prices are fixed when they are agreed upon. *United States* v. *Socony-Vacuum Oil Co., supra*, p. 222. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. *Id.*" [14]

Differences between vertical and horizontal agreements may support an argument that the former are more reasonable, and therefore more likely to be upheld as lawful, than the latter. But such differences provide no support for the Court's contradictory reasoning that the direct and intended consequences of one form of conspiracy do *not* constitute "antitrust injury," while precisely the same consequences of the other form *do*.

Finally, the Court's treatment of vertical maximum price-fixing arrangements necessarily assumes that all such conspiracies have the same competitive consequences. *Ante*, at 8, 9-10, 16. The Court is again quite wrong.[15]

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[14] *United States* v. *Masonite Corp.*, 316 U.S. 265, 274-276 (1942). See also *ante*, at 6-7, n. 6 (suggesting a horizontal component of the maximum price-fixing arrangement in *Kiefer-Stewart*); *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 744-748 (1988) (dissenting opinion).

[15] Indeed, the Court elsewhere acknowledges that "'[m]aximum and minimum price fixing may have different consequences in many situations.'" *Ante*, at 13, n. 13 (quoting *Albrecht*, 390 U.S., at 152). This is quite true. See, *e.g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 348 (1982) (the *per se* rule against maximum prices guards against the elimination of competition, discouraging

For example, a price agreement that is ancillary to an exclusive distributorship might protect consumers from an attempt by the distributor to exploit its limited monopoly. However, a conclusion that such an agreement would not cause any antitrust injury lends no support to the Court's holding that an illegal price arrangement designed to drive a competitor out of business is immune from challenge by its intended victim.[16]

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entry into the market, deterring experimentation, and allowing hidden price setting); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 51, n. 18 (1977) (vertical price fixing reduces inter- and intra-brand competition and may facilitate cartelizing). In *Sylvania*, the Court also recognized that "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States." *Ibid.* See also *White Motor Co.* v. *United States*, 372 U.S. 253, 268 (1963) (BRENNAN, J., concurring) ("Resale price maintenence is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands").

[16] The Court grudgingly "assume[s], *arguendo*, that *Albrecht* correctly held that vertical, maximum price-fixing is subject to the *per se* rule," *ante*, at 5, n. 5, but seeks to limit that holding to "potential effects on dealers and consumers, not . . . *competitors*," *ante*, at 6. However, in its zeal to narrow antitrust injury, the Court assumes that all vertical maximum price-fixing arrangements mimic the circumstances present or discussed in *Albrecht*, in which there was monopoly power at both the production and exclusive distributorship stages. This approach is incorrect. For example, in *Albrecht* itself the Court identified possible injury to consumers as one basis for its *per se* rule, even though there was no evidence of actual consumer injury in that case. 390 U.S., at 152-153. Furthermore, the *Albrecht* Court did not treat Albrecht himself as a "dealer" in the conspiracy, but essentially as a "competitor" targeted by the price-fixing conspiracy between Herald Company and the new dealers that were hired "to force petitioner to conform to the advertised retail price" by selling newspapers in his territory at lower, fixed prices. *Id.*, at 149-150, and n. 6. Although Albrecht was a *potential* Herald dealer—and thus not strictly a "dealer" or a "competitor" in the Court's use of those terms—what is critical

V

In a conspiracy case we should always ask ourselves why the defendants have elected to act in concert rather than independently.[17] Although in certain situations collective action may actually foster competition, see, *e.g.*, *National Collegiate Athletic Assn.* v. *Regents of University of Oklahoma*, 468 U.S. 85 (1984), we normally presume that the free market functions most effectively when individual entrepreneurs act independently. This is true with respect to both maximum and minimum pricing arrangements.

Professor Sullivan recognized that producers fixing maximum prices "are not acting from undiluted altruism," but from self-interested goals such as prevention of new entries into the market. L. Sullivan, Law of Antitrust 211 (1977). He described the broad policy reasons to prohibit collusive pricing:

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is that he had standing to bring a § 1 action as the victim of a vertical conspiracy to underprice his sales. Finally, the Court contradicts its own contrived model when it admits that vertical maximum price-fixing schemes may facilitate predatory pricing for which a competitor could suffer "antitrust injury" in violation of § 2. *Ante*, at 10, n. 9.

[17] Until today, the Court has clearly understood why § 1 fundamentally differs from other antitrust violations:

"The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984).

> "The policy which insists on individual decisions about price thus has at its source more than a preference for the independence of the small businessman (though that is surely there) and more than a preference for the lower prices which such a policy will usually yield to consumers (though that too is strongly present). Also at work is the theoretical conviction that the most general function of the competitive process, the allocation and reallocation of resources in a rational yet automatic manner, can be carried out only if independence by each trader is scrupulously required. Created out of the confluence of these parallel strivings, the policy has a breadth which makes it as forbidding to maximum price arrangements as to the more common ones which forestall price decreases." *Id.*, at 212.

In carving out this exception to the enforcement of §1, the Court has chosen to second guess the wisdom of our *per se* rules and to embark on the questionable enterprise of parsing illegal conspiracies. This approach fails to heed the prudence urged in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972):

> "The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.
>
> "In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition. *E.g., United States* v. *General Motors Corp.*, 384 U.S. 127, 146-147 (1966); *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941)." *Id.*, at 609-610.

The Court, in its haste to excuse illegal behavior in the name of efficiency,[18] has cast aside a century of understanding that our antitrust laws are designed safeguard more than efficiency and consumer welfare,[19] and that private actions not only compensate the injured, but also deter wrongdoers.[20]

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[18] See, *e.g.*, *ante*, at 8, n.7 ("Rivals cannot be excluded in the long run by a nonpredatory maximum price scheme unless they are relatively inefficient"); *ante*, at 14 ("insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored"). Firms may properly go out of business because they are inefficient; market inefficiencies may also create imperfections leading to some firms' demise. The Court sanctions a new force—the super-efficiency of an illegally combined group of firms who target their resources to drive an otherwise competitive firm out of business. Cf. Note, Below-Cost Sales and the Buying of Market Share, 42 Stan. L. Rev. 695, 741 (1990) (discussing long-term displacement of "otherwise efficient producers" by pricing to buy out a market share in a geographic area).

[19] Chief Justice Hughes regarded the Sherman Act as a "charter of freedom," *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359 (1933). Judge Learned Hand recognized Congress' desire to strengthen small business concerns and to "put an end to great aggregations of capital because of the helplessness of the individual before them," *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 428-429 (CA2 1945), and we recently reaffirmed that the Sherman Act is "the Magna Carta of free enterprise," *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). See also, *e.g.*, Handler, Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in its National Policy? 10 Cardozo L. Rev. 1933 (1989); Hovenkamp, Distributive Justice and the Antitrust Laws, 51 Geo. Wash. L. Rev. 1 (1982); Flynn & Ponsoldt, Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes, 62 N. Y. U. L. Rev. 1125, 1137-1141 (1987) (discussing the political, social, and moral—as well as economic—goals motivating Congress in enacting antitrust legislation).

[20] See, *e.g.*, *Simpson* v. *Union Oil Co. of California*, 377 U.S. 13 (1964); see also Polden, Antitrust Standing and the Rule Against Resale Price Maintenance, 37 Clev. St. L. Rev. 179, 208-209, 220-221 (1989) (§ 4 furthers Congressional objectives of deterrence and

As we explained in *United States* v. *American Tobacco Co.*, 221 U.S. 106, 183 (1911): "it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act." The conspiracy alleged in this complaint poses the kind of threat to individual liberty and the free market that the Sherman Act was enacted to prevent. In holding such a conspiracy immune from challenge by its intended victim, the Court is unfaithful to its history of respect for this "charter of freedom."[21]

I respectfully dissent.

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compensation by allowing private suits by injured competitors); Blair & Harrison, 42 Vand. L. Rev., at 1564-1565 (treating losses of firms that are targeted by unsuccessful predatory efforts as "antitrust injury" furthers private enforcement of antitrust laws and avoids "suboptimal levels of deterrence").

The Court of Appeals below observed that barring competitor standing leaves enforcement of the "vast majority of unlawful maximum resale price agreements" in the hands of "an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement." 859 F.2d 687, 694, n. 5 (CA9 1988).

[21] *Appalachian Coals, Inc.*, 288 U.S., at 359.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5681

D.C. No. CV 83-3508-WPG

USA PETROLEUM CO.,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD CO.,
Defendant-Appellee.

On Remand from the United States Supreme Court

Argued and Submitted
April 16, 1992—Pasadena, California

Filed August 12, 1992

Before: Arthur L. Alarcon, Dorothy W. Nelson, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge D.W. Nelson; Dissent by Judge Alarcon

Alicia Rosenberg, Blecher & Collins, Los Angeles, California, for the plaintiff-appellant.

Ronald Redcay, Arnold & Porter, Los Angeles, California, for the defendant-appellee.

OPINION

D.W. Nelson, Circuit Judge:

Atlantic Richfield Co. ("ARCO") is one of the "major" oil companies; USA Petroleum Co. ("USA") is an "independent" gasoline marketer. USA alleges that ARCO and its dealers conspired to drive USA and other independents out of the retail gasoline market by agreeing to set retail gasoline prices below market levels. USA alleges that this vertical agreement to fix maximum resale prices violates section 1 of the Sherman Act, 15 U.S.C. §1.

USA appealed from the decision of the district court granting summary judgment in favor of defendant ARCO on the antitrust claims. We reversed, holding that USA had standing to challenge ARCO's alleged vertical maximum resale price maintenance scheme. *USA Petroleum v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988). The Supreme Court in turn reversed the judgment of this court, holding that a competitor does not have standing to challenge such a scheme unless the prices fixed were predatory. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). On remand, USA argues that the grant of summary judgment still must be reversed on the alternative ground that the district court wrongly dismissed USA's predatory pricing claims. We agree, and we therefore reverse the judgment of the district court and remand for further procedings.

I. Facts

USA filed this antitrust action in 1983, alleging that ARCO had agreed with its independent dealers to set below-market prices in the retail gasoline market in an

effort to drive independent producers like USA out of business. USA alleged that ARCO's conduct violated the antitrust laws in two ways. First, an agreement to set maximum resale prices is illegal per se under section 1 of the Sherman Act, regardless of the prices set. Second, USA alleged that ARCO's prices were "predatory" [1] and constituted an attempt to monopolize in violation of section 2 of the Sherman Act, 15 U.S.C. §2. On April 28, 1986, USA voluntarily dismissed its section 2 attempted monopolization claim because it could not show the "dangerous probability of success" necessary to prevail on that claim. USA continued to press its section 1 claim, however.

On June 30, 1986, ARCO moved for partial summary judgment on USA's section 1 claim. ARCO offered two arguments in support of this motion. First, it argued that USA had no standing to assert the claim because it could not suffer antitrust injury from a conspiracy to set maximum prices unless those prices were predatory. Second, it argued that USA could not prove ARCO's prices were predatory because it could not show a dangerous probability of successful monopolization. At no time did ARCO controvert USA's claim that ARCO had set its prices below cost. USA responded to the motion for summary judgment by asserting that it did not need to show either antitrust injury or a dangerous probability of success. The district court granted ARCO's motion for summary judgment. It held that, "[e]ven assuming that USA can establish a vertical conspiracy to maintain low prices, it cannot satisfy the 'antitrust injury' requirement of Clayton Act §4, without showing such prices to be predatory." It held that USA could not show that ARCO's prices were predatory because ARCO did not possess market power and therefore was unlikely to succeed in monopolizing the market.

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[1] A predatory price is one which is below "some appropriate measure of cost." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 nn.8-9 (1986).

We reversed the district court. We held that USA did have standing to challenge a conspiracy to set maximum prices under section 1. *USA Petroleum*, 859 F.2d at 689. Because such a conspiracy is per se illegal regardless of whether the price is predatory, we did not reach the issue of whether ARCO had engaged in predatory pricing. The Supreme Court in turn reversed. The Court held that "[a]lthough a vertical, maximum-price-fixing agreement is unlawful under §1 of the Sherman Act, it does not cause a competitor antitrust injury *unless it results in predatory pricing*." *Atlantic Richfield*, 495 U.S. at 339 (emphasis added). The Court then remanded the case to this court for "proceedings consistent with this opinion." *Id.* at 346.

II. Jurisdiction

At the outset, ARCO argues that we should not reach the question of whether ARCO engaged in predatory pricing for two reasons. First, ARCO claims that USA explicitly abandoned its predatory pricing claims before the district court. This claim is belied by the record. In its complaint, USA alleged, among others, the following violations of section 1: "Arco and its co-conspirators have organized a resale price maintenance scheme," "Arco and its co-conspirators have implemented severe and predatory price cuts," and "Arco has extended to its co-conspirators and others prices on gasoline which are below cost. These prices have facilitated the maintenance of retail prices at artificially low and uncompetitive levels." In addition, USA also alleged resale price maintenance and predatory pricing claims under section 2 of the Sherman Act. USA later agreed to dismiss its section 2 claims, leaving only its section 1 claims to be disposed of by the court. Among those section 1 claims remaining for resolution were USA's allegations of a predatory pricing conspiracy.

In granting ARCO's motion for summary judgment, the district court reasoned as follows: "It seems to me that there would only be . . . an antitrust injury if the de-

fendant sought to establish predatory prices, otherwise there would only be a conspiracy to compete. . . . And the definition of predatory prices, as I understand it from the papers, is that—one which creates a dangerous probability of successful monopoly." In response, counsel for USA repeatedly argued that dangerous probability of success applied only to section 2 claims, not the section 1 predatory pricing claim before the court.

It is clear from the record that the district court considered USA's section 1 predatory pricing claims. The court disposed of USA's claims on two grounds. First, as to all claims *except* the predatory pricing claims, it found that USA lacked standing because it could not prove antitrust injury. Second, as to the predatory pricing claims, it found that USA could not prove dangerous probability of successful monopolization. Thus, contrary to ARCO's suggestion, USA asserted its section 1 predatory pricing claims before the district court, and the district court in fact resolved those claims on the merits.

ARCO's second argument is that the Supreme Court's decision in this case forecloses any further consideration by this court. A review of the Ninth Circuit and Supreme Court opinions reveals otherwise. In its original appeal to this court, USA argued both that it had standing to bring its resale price maintenance claims and that the district court erred in dismissing its predatory pricing claims. Indeed, it spent several pages in its 1987 opening brief discussing the predatory pricing issue. *See* Appellant's Brief at 7, 15-20 ("By requiring USA to show . . . a dangerous probability of successful monopolization before ARCO's vertical price-fixing could be anticompetitive and cause USA antitrust injury, the district court contravened Supreme Court authority and impermissibly engrafted Section 2 elements onto USA's Section 1 price-fixing case."); Appellant's Reply Brief at 15-23.[2] We

[2] In light of this, it is difficult to understand the dissent's apparent assertion that USA did not raise the predatory pricing issue in

reached only the antitrust injury issue, however: "The question on appeal is whether *in the absence of proof of predatory pricing* a competitor can recover damages because of a maximum resale price maintenance agreement." *USA Petroleum*, 859 F.2d at 689 (emphasis added). We concluded that USA did have standing to bring its maximum resale price maintenance claims; we therefore reversed and remanded the case without reaching the predatory pricing issue.[3]

In reversing, the Supreme Court held that "[a]lthough a vertical maximum-price-fixing agreement is unlawful under §1 of the Sherman Act, it does not cause a competitor antitrust injury *unless it results in predatory pricing*." *Atlantic Richfield*, 495 U.S. at 339 (emphasis added). Far from resolving the question of whether predatory

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its first appeal to this court. *See* dissent, at 6-8. Indeed, ARCO clearly believed that USA has raised the issue; it devoted more than ten pages of its brief to rebutting an argument the dissent now claims was never made. *See, e.g.*, Appellee's 1987 Brief at 5-6, 9-10 ("[T]he district court correctly dismissed USA's Sherman Act § 1 claim, even assuming that USA could have proved that ARCO and ARCO-brand dealers conspired to depress the dealers' prices and that USA suffered diminished profits as a result of the depressed prices."), 35-44 ("The district court's decision is predicated on a third basic principle of antitrust law. Predatory pricing violative of the antitrust laws occurs only where there is a dangerous probability of successful monopolization. . . . Since ARCO admittedly posed no threat of monopolization, summary judgment dismissing the Section 1 claim was proper.").

[3] The predatory pricing conspiracy alleged in this case is merely one type of a vertical maximum price fixing agreement. A vertical maximum price fixing agreement requires that ARCO and its downstream purchasers have agreed to set resale prices at or below *any* level. A vertical conspiracy to predate requires that ARCO and its downstream purchasers have agreed to set resale prices below some appropriate measure of cost. Thus, proof of a vertical predatory pricing conspiracy in this case would necessarily entail proof of a maximum resale price maintenance agreement, so it was unnecessary to reach the predatory pricing issue if USA could prevail on its vertical maximum price fixing claim.

pricing had occurred here, the Supreme Court expressly did not reach that issue. Noting that the Ninth Circuit had not reached that issue, the Court said: "For purposes of this case we likewise assume that petitioner's pricing was not predatory in nature." *Id.* at 333 n.3. Neither the Ninth Circuit nor the Supreme Court, therefore, ever resolved the predatory pricing claim USA raised.

The dissent offers two additional reasons not to reach the predatory pricing issue in this case. First, the dissent finds in the Supreme Court's opinion a "clear direction . . . to this court to enter an order affirming the district court." Dissent, at 9689. The Supreme Court said no such thing. Instead, it explicitly remanded the case to this court for further "proceedings consistent with this opinion." 495 U.S. at 346. This mandate is completely consistent with the Court's decision on the merits, which was that USA could suffer antitrust injury, but only if ARCO's prices were predatory. The Court left open the same question we had previously left unresolved—whether ARCO's prices were predatory in this case.

Second, the dissent argues that we should reject USA's predatory pricing claim on our own motion because USA presented no proof that ARCO's prices were predatory. It is true that USA did not offer proof that ARCO had priced below cost, but that is because ARCO never put that claim in issue. USA's complaint alleged that ARCO had priced below cost. ARCO's motion for summary judgment did not controvert that claim.[4] Instead, ARCO sought summary judgment on the predatory pricing allegation solely on the grounds that USA could not prove

[4] Indeed, ARCO appears to concede the issue in its own motion for summary judgment: "[We] proceed[] from the assumption that USA could prove that Atlantic Richfield set the retail prices of the competing distributors or dealers at levels lower than would have prevailed but for vertical conspiracy . . . . [T]he allegedly conspiratorially low prices, *even if illegal*, did not cause USA injury of the type that the antitrust laws were intended to prevent." (emphasis added).

dangerous probability of success. The district court granted summary judgment on that basis alone. Because ARCO never argued in its motion for summary judgment that its prices were above cost, USA was under no obligation to come forward with evidence proving that element of its case. It is axiomatic that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To conclude otherwise would be to hold that a defendant could put the plaintiff to its proof on every element of its claim before trial, merely by invoking the magical words "summary judgment."

In short, USA was given no opportunity before the district court to prove that ARCO had priced predatorily, because the district court believed that USA was required to and could not establish dangerous probability of success. USA properly challenged the district court's ruling on its initial appeal to this court, devoting five pages of its brief to the issue. Because of our resolution of the case, we did not reach that issue. To refuse to reach it now, as the dissent would have us do, would be to deny USA *any* opportunity to appeal the district court's decision on predatory pricing because of our earlier erroneous decision in USA's favor on the antitrust injury issue. Nothing in the Supreme Court's mandate or the law of summary judgment compels such a perverse result.

Because the Supreme Court has held that USA has standing only to pursue a predatory pricing claim, we must now decide whether the district court properly dismissed that predatory pricing claim.

III. Standard of Review

We review the district court's grant of summary judgment de novo. *Thurman Indus., Inc. v. Pay 'n Pak Stores, Inc.*, 875 F.2d 1369, 1373 (9th Cir. 1989). We must determine whether, viewing the evidence in the light

most favorable to USA, there are genuine issues of material fact and whether the district court correctly applied the substantive law. *Id.*

IV. Section 1 Predatory Pricing Claim

The antitrust laws contain a fundamental distinction between unilateral and concerted action. Unilateral action is governed by section 2 of the Sherman Act, and is illegal only if it constitutes actual or threatened monopolization. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). Concerted action, by contrast, falls within section 1 of the Sherman Act, and is judged more sternly. Many categories of concerted action are illegal per se—that is, without regard to their market effect. *Id.* at 767-68.

In this case, USA alleged concerted action in violation of section 1—namely, a conspiracy between ARCO and its dealers to fix maximum prices above which the dealers could not resell ARCO gasoline. Vertical agreements to fix prices are illegal per se, regardless of whether the prices so fixed are predatory. *Atlantic Richfield*, 495 U.S. at 335; *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1968). Because the predatory pricing conspiracy alleged in this case is such an agreement to fix prices, it must be evaluated under the per se rule. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986) (horizontal conspiracy to predate treated as a per se violation); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-48 (1982) (vertical and horizontal agreements to set prices are illegal per se regardless of the price set); P. Areeda & H. Hovenkamp, Antitrust Law ¶711.2, at 616 (Supp. 1991) (same); Jorde & Lemley, *Summary Judgment in Antitrust Cases: Understanding Monsanto and Matsushita*, 36 Antitrust Bull. 271, 287

(1991) ("Section 2 [predatory pricing] cases are subject to the rule of reason, which means that a defendant will have a chance to defend its conduct as procompetitive. Because the plaintiffs . . . alleged a *conspiracy* to price below, however, their claim arises under section 1 and is subject to a per se rule.") (emphasis added).

In this case, the district court rejected USA's predatory pricing claim because it held that USA could not prove that ARCO had a dangerous probability of successful monopolization. The district court erred in applying the "dangerous probability of success" standard in a per se section 1 case. Dangerous probability of success is an element of an attempted monopolization claim under section 2. *See Wm. Inglis & Sons. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); E. Fox & L. Sullivan, Antitrust Law 162 (1989). It has never been required, however, to prove a section 1 claim. Indeed, the Supreme Court has on several occasions expressly rejected the very argument ARCO makes here. *See, e.g., Copperweld*, 467 U.S. at 767-68 ("Section 1 of the Sherman Act, in contrast [to section 2], reaches unreasonable restraints of trade effected by a 'contract, combination, or conspiracy'. . . . [I]t is not necessary to prove that concerted activity threatens monopolization."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 (1940) ("The group making [price-fixing] agreements may or may not have power to control the market. . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.").

Further, this circuit has rejected the attempt to import the dangerous probability test into section 1 predatory pricing cases. For example, in *Western Concrete Structures v. Mitsui & Co.*, 760 F.2d 1013, 1016-18 (9th

Cir.), *cert. denied*, 474 U.S. 903 (1985), we distinguished between the elements required to prove a section 1 predatory pricing claim and those required to prove a section 2 claim. There, we said that predatory pricing under section 2 "differs from section 1, which requires a conspiracy, but does not require monopolizing or attempting to monopolize." Id. at 1017. Indeed, this is the basic distinction between a section 1 claim and a section 2 claim. A section 1 plaintiff is required to prove the existence of a conspiracy.[5] Once the plaintiff has done so, however, it is relieved of the burden of proving actual or potential monopolization.

We have found no case in this circuit or any other that has applied the dangerous probability requirement to conduct which is illegal per se under section 1. We reject ARCO's argument that dangerous probability should be required in this case. To require such a showing would be tantamount to saying that a conspiracy to predate violates section 1 only if it also violates section 2. Such a holding would in essence abolish the long-standing rule that a predatory pricing conspiracy is illegal without regard to its actual or potential market effect. The Supreme Court has reaffirmed that rule in this very case, *see Atlantic Richfield*, 495 U.S. at 335, and we have no occasion to second-guess that judgment.[6]

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[5] In *Matsushita*, the plaintiffs alleging the existence of a predatory pricing conspiracy sought to infer the existence of the conspiracy itself from ambiguous evidence. The Court rejected this attempt, holding that to survive summary judgment, "a plaintiff seeking damages for a violation of section 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable . . ." 475 U.S. at 588 (citation omitted). Unlike the defendants in *Matsushita*, ARCO has not contested USA's allegation that it conspired with its dealers to set prices.

[6] Indeed, the rule urged on us by ARCO would be perverse. *Atlantic Richfield* makes it clear that agreements to set maximum

IV. Conclusion

The district court erred in requiring that USA prove a dangerous probability of successful monopolizaiton in order to proceed to trial on its section 1 predatory pricing claim. It did not consider whether USA could demonstrate that ARCO had in fact engaged in predatory pricing—that is, pricing below cost—in this case. On remand, USA is entitled to attempt to prove that ARCO conspired to set predatory prices. The judgment of the district court is REVERSED and REMANDED.

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resale prices are illegal without proof of a dangerous probability of monopolization. 495 U.S. at 342. To rule in ARCO's favor in this case would require us to conclude that agreements to set predatory prices are not illegal unless dangerous probability is proven. This would produce the rather remarkable result that *all* agreements to set maximum prices *above* cost are illegal, while only some agreements to set maximum prices *below* cost are illegal. We can conceive of no reason to believe the Supreme Court intended such a result when it decided *Atlantic Richfield*.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

I would carry out the mandate of the United States Supreme Court and enter a brief order affirming the district court's order.

I.

Prefatory Statement

The district court granted summary judgment in favor of the Atlantic Richfield Company (ARCO). It held that the USA Petroleum Company (USA) was not entitled to damages for a violation of Section 1 of the Sherman Act, 15 U.S.C. §1, because it had failed to demonstrate "antitrust injury."

On October 7, 1988, Judges Nelson and Reinhardt reversed "the decision of the district court and remand[ed] the case for further proceedings consistent with this opinion." *USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988). Presumably the majority's somewhat inscrutable mandate directed the district court to proceed to trial. The majority appeared to have ruled that USA demonstrated "antitrust injury," entitling it to recover damages if it can meet the requisite standard of persuasion at trial. *Id.*

On May 14, 1990, the Supreme Court reversed this court's decision. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The Court's holding is stated in words that are free from ambiguity.

> Respondent argues that, as a competitor, it can show anti-trust injury from a vertical conspiracy to fix maximum prices that is unlawful under §1 of the Sherman Act, even if the prices were set above predatory levels. In addition, respondent maintains that any loss flowing from a *per se* violation of §1 automatically satisfies the antitrust injury requirement.

> We reject both contentions and hold that respondent has failed to meet the antitrust injury test in this case. We therefore reverse the judgment of the Court of Appeals.

Id. at 335.

Thus, the Supreme Court reversed the judgment of the majority of this panel that the district court erred in holding that USA could not recover damages under Section 1 of the Sherman Act for failure to show "antitrust injury." Notwithstanding the clear direction of the Supreme Court to this court to enter an order affirming the district court, on November 13, 1991, USA filed a document styled as a "Motion for Clarification On Remand From Supreme Court" in which it boldly requested this court to "*reverse* the district court's grant of summary judgment." For reasons that find no support in the Supreme Court's decision in this matter, the majority has declined to enter an order affirming the district court's dismissal of this action for failure to demonstrate antitrust injury, and again reversed the order granting partial summary judgment on the Section 1 claim. I cannot join in the majority's opinion. My oath of office requires me to follow the mandate of the Supreme Court.

II.

THE DISTRICT COURT MUST BE AFFIRMED BECAUSE USA FAILED TO INTRODUCE EVIDENCE OF PREDATORY PRICING

USA has asked this court to "clarify" the Supreme Court's mandate that we affirm the grant of summary judgment in this action because USA failed to demonstrate antitrust injury by reversing the judgment of the district court. USA seeks to reverse an issue it lost in the district court because it failed to present any evidence to demonstrate that ARCO's prices were predatory. A recitation of the procedural history of this case will readily

demonstrate that this court should promptly terminate USA's clever gamesmanship and enter a final order in this case that upholds the district court's wise analysis of each issue, and respects the mandate of the Supreme Court.

A. *Proceedings Before the District Court*

USA alleged in its amended complaint that in violation of Section 1 of the Sherman Act, "ARCO and its co-conspirators have implemented severe and predatory price cuts." After almost three years of exhaustive discovery covering a three-year period, ARCO filed a motion for a partial summary judgment on March 31, 1986. ARCO requested dismissal of USA's Section 1 and Section 2 claims on the ground that USA could not satisfy the "antitrust injury" requirement of Section 4 of the Clayton Act because USA had failed to show that its prices were predatory. On April 28, 1986, USA entered into a stipulation for an order dismissing its Section 2 claim. On July 25, 1986, after the dismissal of its Section 2 claim, USA filed a document entitled "Statement of Genuine Issues". USA stated the only issues in dispute were

> "1. Whether ARCO has engaged in a vertical price fixing conspiracy with ARCO-branded distributors and ARCO-branded dealers to fix prices at artificially low levels?
>
> 2. Whether ARCO's vertical price fixing conspiracy has caused USA injury and in what amount?

USA did not contend that predatory pricing was a genuine issue of fact in dispute. USA relied instead on its theory that antitrust injury can be shown solely by proof of an unlawful conspiracy to fix below market retail gasoline prices. Thus any factual issue concerning predatory pricing was abandoned by USA *prior* to the

hearing on ARCO's motion for a partial summary judgment on the Section 1 claim.

A hearing on ARCO's motion for a summary judgment on the Section 1 claim was conducted on October 14, 1986. During his argument in opposition to the motion, USA's counsel conceded that it could not prove predatory pricing on the remaining Section 1 claim "even by the most liberal standard". USA accurately described the essence of the October 14, 1986 proceedings in its opening brief before this court dated July 6, 1987.

> The district court granted ARCO's motion on February 25, 1987. (CR 100, 103.) The court held that ARCO's vertical conspiracy to fix below-market prices was procompetitive and therefore could not produce the kind of injury that the antitrust laws were intended to prevent. The court ruled USA was required to prove that the conspiracy between ARCO and its dealers fixed "predatory" prices and that ARCO had a dangerous probability of successfully monopolizing the market in order to satisfy the antitrust injury requirement of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690 (1977). *Plaintiff*, already having abandoned its Section 2 Sherman Act claims, *offered no proof on predatory pricing* or dangerous probability of monopolization. The Court entered judgment for ARCO under Fed. R. Civ. P. 54(b). (CR 100, 103.) USA appeals from that judgment.

(emphasis added).

Based on the uncontroverted facts, the district court concluded that USA had failed to make a showing that ARCO's prices were predatory. In its order dismissing the Section 1 claim, the district court summarized its legal conclusion as follows:

> Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff

> cannot satisfy the "antitrust injury" requirement of Clayton Act §4, without showing such prices to be predatory.

As noted above, USA offered no evidence that the prices were predatory.

Contrary to the majority's conclusion at page 9678, the record unmistakably demonstrates that USA expressly abandoned its predatory pricing claim before the district court. USA offered no evidence of predatory pricing. USA represented to the district court that the only genuine issues of material fact in dispute to be decided on summary judgment were whether ARCO had engaged in a conspiracy to fix prices below market level; and, if so, whether USA was injured by this conduct.

B. *Issue On Appeal To The Ninth Circuit*

On the first page of its opening brief before this court, under the heading "Statement Of The Issue" USA represented as follows:

"The *sole issue* is whether USA Petroleum Company's lost sales and reduced profits from the defendant's *per se* unlawful resale price maintenance conspiracy to fix artificial, below-market retail gasoline prices constitutes antitrust injury." (emphasis added). On page 5 of its opening brief, USA summarized the issue raised by ARCO's partial motion for a summary judgment regarding the Section 1 claim as follows:

> Even given the existence of the unlawful conspiracy and its conceded effect on retail gasoline prices, ARCO contended that USA, a competitor, could not suffer antitrust injury from this vertical price-fixing scheme.

Judges Nelson and Reinhardt accepted USA's statement that it had presented a single issue for review. The majority in *its* first opinion in this matter, correctly identified the issue presented by USA as follows:

> The question on appeal is whether in the absence of proof of predatory pricing a competitor can recover damages because of a maximum resale price maintenance agreement. Specifically, we must decide whether a competitor's injuries resulting from vertical *non-predatory*, maximum price fixing fall within the category of "antitrust injury."

859 F.2d at 689. (emphasis added).

The majority's characterization of the prices fixed by ARCO as "nonpredatory" is supported by the record and USA's candid admission that it "offered no proof of predatory pricing." Appellant's Opening Brief at 6. In reversing the dismissal of the Section 1 claim, the majority concluded that "the purposes and policies of the antitrust laws are best effectuated by recognizing the 'standing' of competitors to enforce the antitrust laws against price-fixing conspiracies." 859 F.2d at 697.

The majority refers the reader to several pages of USA's opening and reply briefs in support of its conclusion that "USA was given no opportunity before the district court to prove that ARCO had priced predatorily. . . ." Majority Opinion at 9683. Because anyone reading these opinions who is not a party or a member of this court has no ready access to USA's briefs, I have attached each of the pages from the appellant's briefs cited by the majority as an appendix to this dissent.

I have read the pages cited by the majority. Nowhere in its briefs does USA ask this court to reverse the judgment because it was not given an opportunity to prove that ARCO's prices were predatory. Clearly, USA could not do so because of its judicial admission before the district court that it could not prove predatory pricing under the most liberal standard. Nowhere in its briefs does USA point to any ruling by the district court that prevented it from presenting evidence of predatory pricing. Thus, the record does not support the Majority's

bald assertion that the district court denied USA the opportunity to present evidence of predatory pricing. As noted above, USA conceded in its opening brief at page 6 that it "offered no proof on predatory pricing *or* dangerous probability of monopolization." (emphasis added). It was only after the Supreme Court rejected USA's argument that it could demonstrate antitrust injury by proof of a non-predatory vertical, maximum price-fixing scheme, that USA invented its spurious second issue. As discussed above on page 9692 of this dissent, prior to its defeat before the Supreme Court, USA informed this court on page 1 of its brief that the "sole issue" raised in this appeal concerned its contention that ARCO's "*per se* unlawful resale price maintenance conspiracy to fix artificial, below-market retail gasoline prices constituted anti-trust injury." I would affirm the district court precisely because USA was *not* denied the opportunity to present evidence of predatory pricing.

In its petition for a rehearing, ARCO characterized the question presented by USA's appeal as follows: "The majority and dissenting opinions agree that [this] appeal presents the single issue, 'whether a competitor's injuries resulting from vertical *non-predatory*, maximum price fixing fall within the category of 'antitrust injury.'" USA, in its opposition to the petition for a rehearing did not argue that ARCO's recitation of the sole question before this court was erroneous.

In footnote 5 of its response to the petition for a rehearing, USA states that, "ARCO's suggestion that the *only* anticompetitive effect of maximum vertical price-fixing in the setting of a predatory price is wrong. The Supreme Court has consistently condemned *all* price fixing because it artificially distorts the competitive process." This argument demonstrates USA's unyielding adherence to its mistaken notion that it was not required to show predatory price fixing to demonstrate antitrust injury.

C. *The Issue Presented to the Supreme Court.*

The Supreme Court granted certiorari to resolve the sole issue raised in USA's appeal to this court. Justice Brennan framed the issue before the Court as follows: "This case presents the question whether a firm incurs an 'injury' within the meaning of the antitrust laws when it loses sales to a competitor charging *non-predatory* prices pursuant to a vertical, maximum-price-fixing scheme." 495 U.S. at 331 (emphasis added).

The Court summarized the district court's reasoning as follows:

> The District Court granted summary judgment for ARCO on the §1 claim. The court stated that "[e]ven assuming that [respondent USA] can establish a vertical conspiracy to maintain low prices, [respondent] cannot satisfy the 'antitrust injury' requirement of Clayton Act §4, without showing such prices to be predatory." App. to Pet. for Cert. 3b. The court then concluded that respondent could make no such showing of predatory pricing because, given petitioner's market share and the ease of entry into the market, petitioner was in no position to exercise market power.

Id. at 333.

The Supreme Court reversed this court's judgment. *Id.* at 335. The court rejected USA's argument that:

> [I]t is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under §1 of the Sherman Act, rather than an attempt to monopolize prohibited by §2.

Id. at 338.

The Court held that "[a]lthough a vertical maximum-price-fixing agreement is unlawful under §1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing." *Id.* at 339. The Court's concluding paragraph reads as follows: "Respondent has failed to demonstrate that it has suffered any antitrust injury. The allegation of a *per se* violation does not obviate the need to satisfy this test." *Id.* at 346. The principle announced by the Court in this case is free from doubt. Where, as here, a competitor failed to present any evidence of predatory pricing, the district court must dismiss a Section 1 claim even though the evidence shows an illegal maximum-price-fixing conpiracy.

Having determined that the majority had erred in reversing the district court's dismissal of the Section 1 claim, the Court reversed the judgment of this court and remanded "for proceedings consistent with this opinion." *Id.* In light of USA's concession in its opening brief before this court that it had not presented any evidence of predatory pricing, this court was compelled by the Supreme Court's mandate to enter a simple order stating:

"In conformance with the mandate of the Supreme Court in this matter, 495 U.S. 328 (1990), the judgment of the district court is affirmed."

III.

THE MOTION FOR CLARIFICATION

The Supreme Court announced its decision in this matter on May 14, 1990. On November 13, 1991, prior to any proceedings in this matter consistent with the Court's mandate, USA filed a document labelled as a "Motion for Clarification on Remand from the Supreme Court." Since no action has been taken on the Court's mandate by this court, there was no new order or judgment from this court that required clarification. No rule

was cited by USA authorizing a "clarification" by this court of the import of the Supreme Court's mandate. This court is in no position to "clarify" a decision of the Supreme Court. USA's request for a clarification of the remand order should have been directed to the Supreme Court.

USA has successfully persuaded my distinguished colleagues that it is entitled to a determination by this court on the question whether the record shows that the district court erred in determining that USA had failed to present evidence of predatory pricing. The majority has concluded that it has the authority to reverse the district court once again, notwithstanding the mandate of the Supreme Court, because this court did not reach the predatory pricing issue in its first opinion.

The majority had no authority to reach the predatory pricing issue raised in USA's amended complaint. USA abandoned the issue in its statement of genuine issues in dispute dated July 25, 1986. During the October 14, 1986 proceedings on ARCO's partial motion for a summary judgment regarding the Section 1 claim, USA's counsel, having stipulated to the dismissal of the Section 2 claim, confirmed to the district court that:

> the first thing we need to focus on is the fact that *we are left with a singular claim,* the essence of which is that ARCO formed a combination and conspiracy with its dealers to—in the language of the Supreme Court—to engage in resale price maintenance, to fix vertically the price at which the dealers would resell.

(emphasis added). When the court asked USA's counsel whether he was required to show predatory pricing, Mr. Blecher replied: *"All I have to show in my view is price-fixing.* Price-fixing is in and of itself illegal." (emphasis added). Mr. Blecher informed the court that he could not demonstrate on the evidence before the court that he

could not demonstrate on the evidence before the court that the price was predatory. Mr. Blecher argued that the court was not required to find that "the fixed price is predatory in order to hold the defendant liable." As noted above, USA's concession in its opening brief that it offered no proof of predatory pricing dispels any reasonable doubt regarding its decision to rely solely on the *per se* price-fixing violation as suffiicent evidence of antitrust injury.

The majority concludes that the district court "wrongly dismissed USA's predatory pricing claims." Majority opinion at 9678. I can find no principled basis for this conclusion in the record. ARCO offered evidence that its prices were not predatory in support of its partial motion for a summary judgment on the Section 1 claim. USA informed the district court and this court that it offered no evidence of predatory pricing. Notwithstanding these admirable concessions, my colleagues have somehow persuaded themselves that the district court erred in holding that USA's Section 2 claim must be dismissed because no evidence of predatory pricing was presented.

In response to ARCO's argument that we should not consider USA's predatory pricing theory because it was abandoned in the district court, the majority cites several portions of the amended complaint in which USA referred to predatory pricing. Majority Opinion at 9678-79. The majority has overlooked the fact that subsequent to the filing of the amended complaint, ARCO filed a motion for a partial summary judgment seeking the dismissal of the Section 1 claim. The Supreme Court has instructed that once a motion for a summary judgment has been filed, the plaintiff must present evidence to support the factual allegations in the complaint. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992). The Court set forth this principle in the following passage:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may

> suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim," *National Wildlife Federation, supra,* 497 U.S., at 889, 110 S. Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e) which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those faces (if controverted) must be "supported adequately by the evidence adduced at trial," *Gladstone, supra,* 441 U.S., at 115, n.31, 99 S. Ct., at 1616, n.31.

Id.

USA has acknowledged that it failed to present in the district court, any evidence of predatory pricing. In holding that the district court erred in granting partial summary judgment on the Section 1 claim, because of its view that there was no genuine issue of fact in dispute concerning predatory pricing, the majority has failed to apply the foregoing principles.

The majority has concluded that the district court applied the wrong standard in evaluating the predatory pricing claim in USA's amended complaint. We need not decide whether the district court was mistaken in stating that the proper test for the sufficiency of the evidence of predatory pricing is the dangerous probability of successful monopolization because USA offered no evidence of predatory pricing. Thus, the majority's discussion of the proper standard to be applied in a Section 1 case to evaluate evidence of predatory pricing is an academic exercise that is beyond our Article III jurisdiction. Resolution of that interesting question must await a private antitrust case in which the plaintiff offered proof of predatory pricing. None was offered in this case.

Furthermore, as noted by the majority, it is boilerplate law that we must review a district court's order granting or denying summary judgment independently, without deference to the district court's legal rulings. Even if it were possible to ignore USA's statement in its opening brief that the sole issue before this court is whether ARCO's unlawful conspiracy to fix prices is sufficient to show antitrust injury without proof of predation, we would still be required to determine for ourselves whether the evidence presented by USA raised a genuine issue of material fact on the question of predatory pricing. In performing this task, we would be required to ignore the trial court's legal pronouncements and search the record for evidence of predatory pricing. Performance of that task would be simple in this case because of USA's admission that it offered no proof of predatory pricing in response to the partial motion for a summary judgment to dismiss the Section 1 claim. Thus, even the majority's present creative reading of USA's opening brief, which followed the reversal of its original opinion in this case by the Supreme Court, should compel it to *affirm*, and not reverse the district court's order granting partial summary judgment on the Section 1 claim.

IV

PROHIBITION AGAINST PIECEMEAL APPEALS

Under the law of this circuit, a party cannot assert one theory before this court and, upon losing, return again and assert an entirely different theory. In *Nguyen v. United States*, 792 F.2d 1500 (9th Cir. 1986), we relied on the following principle in reversing an order granted upon a new theory that was inconsistent with our prior mandate:

> Much of the value of summary judgment procedure in the cases for which it is appropriate . . . would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judg-

> ment and then, should that theory prove unsound, come back long thereafter and fight on the basis of some other theory.

Id. at 1503 (quoting *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469-70 (5th Cir. 1967)).

In this matter, USA fought the good fight before this court for a ruling that proof of a conspiracy to fix maximum prices was sufficient to demonstrate antitrust injury without proof that the prices were predatory. Its novel theory proved successful with a majority of this court. The Supreme Court has rejected this argument. Having lost that battle, USA now seeks to return to the district court to challenge ARCO's motion for partial summary judgment on a factual theory it expressly abandoned because it offered no proof of predatory pricing.

CONCLUSION

I would not permit a litigant to return to the district court to pursue a theory asserted in its complaint that it deliberately abandoned in order to test the validity of a discrete argument in its opposition to a partial motion for a summary judgment. Our courts are too burdened with meritorious claims to permit skillful counsel to abuse their right of appeal by offering up successive claims until they finally find one that will persuade at least two judges of this court. This tactic is contrary to the mandate of the Supreme Court in this case and violates this circuit's prohibition against piecemeal review of motions for a summary judgment based on theories that could have been presented previously.

USA candidly admits it offered no evidence of predatory pricing in opposition to ARCO's partial motion for a summary judgment. Instead of rejecting USA's argument on the Section 1 claim that the district court erred in granting summary judgment precisely because USA failed to meet its burden of presenting facts demonstrating that it could

prove the allegations in its complaint, the majority has concluded that the district court must conduct further proceedings on USA's predatory pricing claims. The majority gives no clue to the district court as to the nature of these proceedings. Must the district court permit USA to now attempt to offer proof of predatory pricing it concedes it failed to present at the summary judgment proceedings? Does the majority's reversal of the partial summary judgment order dismissing the Section 1 claim mean that that issue must now be presented to a trier of fact notwithstanding USA's failure to present any evidence raising a genuine issue of material fact concerning the allegations in its complaint that ARCO's prices were predatory?

The Supreme Court ruled in a landmark decision that Judge Nelson and Judge Reinhardt erred in holding that USA had demonstrated antitrust injury on the record presented to the district court. The same judges, after again reviewing the same record, have refused to carry out the Supreme Court's mandate. Once again, the majority has allowed itself to be guided into the same error. I cannot join its number.

APPENDIX TO DISSENT

Page 7 of USA's opening brief reads as follows:

The Supreme Court has unequivocally held that price-fixing is anticompetitive regardless of the level of the fixed price or the defendant's market power. By requiring USA to show that ARCO fixed predatory prices and had a dangerous probability of successful monopolization before ARCO's vertical price-fixing could be anticompetitive and cause USA antitrust injury, the district court contravened Supreme Court authority and impermissibly engrafted Section 2 elements onto USA's Section 1 price-fixing case.

These mistakes led the district court inexorably to conclude that USA's injury was attributable only to legitimate price competition (in the form of *per se* unlawful price-fixing), and was not antitrust injury. The district court's decision effective repeals the *per se* rule against maximum resale price-fixing. Once maximum resale price-fixing is deemed *per se* anticompetitive, it cannot constitute pro-competitive conduct for purposes of determining antitrust injury. Antitrust injury was not intended as a vehicle for rewriting the substantive antitrust laws.

The district court's erroneous decision must be reversed. Given that price-fixing, without more, is *per se* anticompetitive, USA's lost sales and reduced profits resulting directly from selling gasoline in competition with fixed instead of market-determined prices constitutes antitrust injury. USA's injury reflects the very market distortion the

Pages 15-20 of USA's opening brief read as follows:

B. *The Supreme Court has Specifically Held That Anticompetitive Conduct Condemned Under Sherman Act § 1 Does Not Require Threatened Monopolization.*

The district court's second error was to hold, as argued by ARCO, that a Section 1 *per se* offense is anticompeti-

tive and causes antitrust injury only when the defendants have a dangerous probability of successfully monopolizing the market. (CR 83: Exhibit 1 at 35; CR 91:3.)

The Supreme Court has specifically rejected the court's theory. In *Socony-Vacuum,* the Court expressly held that pre-fixing is anticompetitive even absent market power, and rejected a requirement of actual or threatened monopoly power. 310 U.S. at 224, 60 S. Ct. at 844-45; *see also United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, 309-10, 76 S. Ct. 937, 940 (1956). The Court in *Socony-Vacuum* acknowledged that:

> Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

Id. at 224-25, n.59, 60 S. Ct. at 845 n.59. (footnote omitted)

The district court's ruling contravenes the Sherman Act's statutory scheme requiring different degrees of anticompetitive effect for concerted conduct and single firm activity. Whereas Section 1 deems anticompetitive conspiracies in restraint of trade, Section 2 condemns as anticompetitive only single firm conduct threatening monopolization. *Greyhound Computer Corp.* v. *International*

Business Machines Corp., 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S. Ct. 782 (1978); *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 243 (5th Cir. 1978). The Supreme Court rejected any merging of the different standards of liability in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984).

> The Sherman Act contains a "basic distinction between concerted and independent action." The conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression . . . . In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entreprenuer.
>
> Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities . . . . Concerted activity subject to §1 is judged more sternly than unilateral activity under §2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. . . . [Other] combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. *Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.*

Id. at 767-68, 104 S. Ct. at 2739-40 (emphasis added) (citations omitted *see also Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.), Inc.*, 760 F.2d 1013, 1917 (9th Cir.), *cert. denied*, —— U.S., 106 S. Ct. 230 (1985) ("[S]ection 1 . . . requires a conspiracy, but does not require monopolizing or attempting to monopolize.").

This distinction between single firm and concerted conduct necessarily means that the antitrust laws condemn concerted activity that would be perfectly lawful if done by a single firm. Thus, the Supreme Court stated that a conspiracy to fix low prices is *per se* unlawful under Sherman Act Section 1 even when a single firm setting the same price may escape liability under Sherman Act Section 2. *Fisher v. City of Berkeley*, 475 U.S. 260, 106 S. Ct. 1045, 10-49 (1986). (footnote omitted) The district court here, however, ruled that maximum vertical price-fixing requires the §2 elements of predatory pricing and market power to be anticompetitive and capable of causing antitrust injury. The court's decision directly contradicts the Sherman Act's statutory scheme as well as the substantive case law and must be rejected.

Pages 15-23 of USA's reply brief read as follows:

monopolization. ARCO Brief at 23. (footnote omitted)

ARCO would have this Court hold that maximum vertical price-fixing is anticompetitive for violation purposes but procompetitive for antitrust injury purposes. This sort of semantic gymnastics demans the judicial process. No court has ever suggested that price-fixing should not only not be illegal, but encouraged. Yet this is what ARCO asks this Court to hold.

Antitrust injury analysis was not, however, intended to afford defendants the opportunity to rewrite the antitrust laws. ARCO's unprecedented standard is wholly contrary to Sherman Act's statutory scheme and the authority defining price-fixing as anticompetitive regardless

of the level of price and the absence of actual or threatened monopoly power.

A. *ARCO's Argument that Price-Fixing Must Amount To Predatory Pricing with a Dangerous Probability of Successful Monopolization Squarely Contradicts the Sherman Act's Statutory Scheme.*

ARCO's essential argument is that price-fixing must meet the standards for single firm pricing conduct under Sherman Act §2. The plaintiff must therefore prove that the defendant fixed "predatory prices" and had a dangerous probability of successfully monopolizing the market. The Supreme Court and Ninth Circuit have rejected this argument as inconsistent with the Sherman Act's statutory scheme.

The Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984), expressly held that for §1 offenses, "it is not necessary to prove that concerted activity threatens monopolization." *Id.* at 767-68, 104 S. Ct. at 2739-40; *see also Western Concrete Structures Co. v. Mitsui & Co. (U.S.A.), Inc.*, 760 F.2d 1013, 1017 (9th Cir.), *cert. denied*, 106 S. Ct. 230 (1985). Specifically, the Court has held that price-fixing has anticompetitive effects even absent the actual or threatend market power required under Sherman Act §2. *Socony-Vacuum*, 310 U.S. at 224-25 n.59, 60 S. Ct. at 845 n.59.

In the context of maximum price-fixing, the Supreme Court has explicitly held that the antitrust laws deem maximum price-fixing anticompetitive even though the same economic effect, when created by unilateral pricing conduct, would be considered procompetitive under Sherman Act §2. *Fisher v. City of Berkeley*, 106 S. Ct. 1045, 1049 (1986). (footnote omitted). Finding that Berkeley's rent control ordinance constituted unilateral government conduct, the Court did not invalidate the ordinance. *Id.* at 1049-51. The Ninth Circuit followed the *Fisher*

holding and rationale in *Miller v. Hedlund*, 813 F.2d 1344, 1349 (9th Cir. 1987). (footnote omitted)

The Supreme Court leaves no doubt that the Sherman Act defines anticompetitive conduct differently for price-fixing and unilateral pricing conduct. For this reason, the Court has rejected the defense that the price-fixing arrangament fixed competitive prices and refused to assume the burden of making that determination. *E.g.*, *Socony-Vacuum*, 310 U.S. at 221-22, 60 S. Ct. at 843; *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10, 76 S. Ct. 937, 940 (1946). For this reason, the Court has also held that price-fixing is anticompetitive regardless of the defendant's actual or threatened market power. *Socony-Vacuum*, 310 U.S. at 224-25 n.59, 60 S. Ct. at 845 n. 59. ARCO's attempt to merge the price-fixing and predatory pricing standards is wholly without support in either the case law or the statutory scheme.

B. *ARCO's Cited Authorities Do Not Support ARCO's Argument that Price-Fixing is Anticompetitive Only When It Satisfies the Standard Applicable to Single Firm Pricing Conduct.*

ARCO does not attempt to distinguish the vast Supreme Court authority holding that price-fixing and unilateral predatory pricing are distinct and separate offenses subject to different definitions of anticompetitive conduct. Instead, with one exception ARCO continues to cite non-price-fixing cases and urge the adoption of predatory pricing and market power requirements applicable to single firm conduct.

Quoting elliptically from this Circuit's opinion in *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), ARCO misreads that case to support its proposition that price-fixing must amount to predatory pricing to injure com-

petition. *Murphy Tugboat* actually stands for the opposite proposition. The plaintiff in *Murphy Tugboat* alleged that defendant conspired with its pilot/employees to fix the fees charged to customers for pilot services. The Ninth Circuit held that Murphy could not complain of the defendant's price-fixing, not because it was a competitor, as ARCO argues, but becaus it was *not* a competitor in the pilot services market. (footnote omitted) 658 F.2d at 1259. This is precisely how the Ninth Circuit has interpreted *Murphy Tugboat*. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1034 n.27 (9th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982). (footnote omitted)

The only case which appears to merge price-fixing and predatory pricing is *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F. 2d 698 (7th Cir)., *cert. denied*, 469 U.S. 1018 (1984). As discussed at length in USA's Opening Brief at pp. 26-29, Judge Posner used antitrust injury analysis to circumvent the substantive laws' judgment that maximum vertical price-fixing is anticompetitive. The *Jack Walters* opinion holds simply that maximum vertical price-fixing constitutes procompetitive conduct that cannot cause *any* plaintiff antitrust injury. 737 F.2d at 708-09 (characterizing maximum vertical price-fixing as "lawful price competition").

Even under ARCO's theory, *Jack Walters* was wrongly decided. The plaintiff in *Jack Walters* was a distributor who sued his supplier. ARCO concedes that such a plaintiff, an intrabrand competitor, suffers antitrust injury. ARCO Brief at 17.

Moreover, the *Jack Walters* holding cannot be squared with the per se rule's conclusive presumption that mixi-mum vertical price-fixing is anticompetitive. In response to Judge Posner's failure to reconcile his antitrust injury holding with the per se rule's presumption that the defendant's conduct is antcompetitive, one commentator candidly observed: "I cannot escape the conclusion that

Judge Posner—growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht*—has decided to undertake that task on his own." Hovenkamp, *Chicago and Its Alternative*, 1986 Duke L.J. 1014, 1026. (footnote omitted).

Nor does the Supreme Court's decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986), support ARCO's predatory pricing requirement. The plaintiff in *Cargill* alleged that the post-merger entity would engage in a "cost-price squeeze" that would not, however, amount to predatory pricing. The Court held that the antitrust laws condemn single firm pricing conduct as anticompetitive only when it amounts to predatory pricing. Therefore, absent predatory pricing allegations, the plaintiff could not show antitrust injury. *Id.* at 491-92. The Court did not, however, suggest that it intended to overrule *Copperweld* and adopts a predatory pricing standard for concerted price-fixing. Nowhere in the opinion does the Court even mention price-fixing.

ARCO nevertheless argues that *Cargill*'s holding should apply to concerted price-fixing because the antitrust injury requirement applies to all private antitrust damages actions. ARCO Brief at 28-29 ARCO misunderstands antitrust injury analysis. As *Brunswick* makes clear, antitrust injury analysis is not divorced from the substantive antitrust laws. 429 U.S. at 487, 97 S. Ct. at 696. The threshold inquiry is whether the substantive laws condemn the defendant's conduct, the source of the plaintiff's injury, as anticompetitive. *Cargill*, 107 S. Ct. at 491; *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-36 (7th Cir. 1987), *as amended*, 1987-1 Trade Cas. (CCH) ¶67,536. The Court's holding in *Cargill* that the plaintiff had not suffered antitrust injury was premised on its specific finding that the defendant's unilateral pricing conduct did not violate the antitrust laws. 107 S. Ct. at 492. This holding cannot have any application to concerted price-fixing, an entirely distinct offense.

Finally, ARCO cites a myriad of non-price-fixing cases to argue that maximum vertical price-fixing does not injure competition unless the defendant has a dangerous probability of successful monopolization. While ARCO acknowledges that the great weight of Supreme Court authority deems maximum vertical price-fixing anticompetitive even when the defendant does not threaten monopoly, ARCO nevertheless argues that market power is required for antitrust injury. ARCO does not cite one case that even suggests that antitrust violations and antitrust injury require different degrees of anticompetitive effect. Antitrust injury analysis merely asks whether the plaintiff's injury is the type of injury expected to flow from the violation's anticompetitive effects.

The sole §1 case ARCO cites in support of its threatened monopolization requirement is *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). The plaintiffs in *Matsushita* alleged that the defendants conspired to allocate markets and price predatorily within their respective territories. Contrary to ARCO's argument that the Court defined predatory pricing as requiring threatened monopolization, the Court expressly declined to define predatory pricing. *Id.* at 1355 n.8. The Court discussed the costs and benefits of predatory pricing strategies only to determine the quantum of proof necessary to defeat summary judgment as to the existence of a conspiracy. *Id.* at 1356. The Ninth Circuit has recognized that the *Matsushita* decision does not affect the existing definitions of predatory pricing *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 615 (9th Cir. 1986).

That *Matsushita* did not enunciate any specific requirements, including market power, for predatory pricing was made in the Supreme Court's subsequent decision in *Cargill*. The Court expressly stated that predatory pricing strategies may occur even when the defendant lacks market power. 107 S. Ct. at 495 n.15. Certainly, USA

should be entitled to show that ARCO, as the dominant supplier of gasoline in the western United States, restrained competition through its maximum price-fixing scheme.

IV.

CONCLUSION

As a competitor and direct victim of ARCO's scheme to fix resale prices below the level that would have prevailed in an unrestrained market, USA has clearly suffered antitrust injury.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5681

DC No. CV 83-3508-WPG

USA PETROLEUM CO.,
Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD CO.,
Defendant-Appellee.

ORDER

[Filed Mar. 17, 1993]

Before: ALARCON, D.W. NELSON, and REINHARDT, Circuit Judges.

Judges D.W. Nelson and Reinhardt hereby order that this case be withdrawn from submission pending a decision from the Supreme Court in *Brooke Group v. Brown & Williamson Tobacco*, 113 S.Ct. 490 (1992) *cert. granted*, 964 F.2d 335, 342 (4th Cir. 1992).

Judge Alarcon dissents from this order vacating submission.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5681

D.C. No. CV 83-3598-WPG

USA PETROLEUM COMPANY,
Plaintiff-Appellant,
v.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
November 4, 1987—Pasadena, California

Filed October 7, 1988

Before: Arthur L. Alarcon, Dorothy W. Nelson and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt; Dissent by Judge Alarcon

Maxwell E. Blecher, Blecher & Collins, Los Angeles, California, for the plaintiff-appellant.

Ronald C. Redcay, Hughes, Hubbard & Reed, Los Angeles, California, for the defendant-appellee.

OPINION

REINHARDT, Circuit Judge:

USA Petroleum Company (USA) sued Atlantic Richfield Company (ARCO) for violations of the Sherman Act, the Robinson-Patman Act, the Cartwright Act, and various state laws. USA subsequently voluntarily withdrew with prejudice its claim under section 2 of the Sherman Act. ARCO moved for summary judgment on USA's claim under section 1 of the Sherman Act. 15 U.S.C. § 1, and the district court granted its motion. The court entered judgment for ARCO under Fed. R. Civ. P. 54(b), and USA timely appealed. We reverse.

I.

ARCO is an integrated oil company which, among other things, markets gasoline in the western United States. It sells gasoline to consumers both directly and indirectly through ARCO-brand dealers. USA is an independent marketer of gasoline, which it sells at retail under the brand name USA. USA competes directly with ARCO dealers at the retail level.

USA alleges that ARCO conspired with retail service station dealers selling ARCO-brand gasoline to fix retail prices at below-market levels. USA alleges that "ARCO's strategy was to eliminate the independents by fixing and subsidizing below-market prices and siphoning off the independents' volumes and profits," and that it succeeded in that strategy. According to USA, many independents have

been driven out of business. ARCO's subsidies consisted of temporary volume allowances, temporary competitive allowances, and other price allowances extended to its distributors and dealers

For the purpose of reviewing the district court's summary judgment order, we must assume these allegations to be correct. *See Baker v. Department of Navy*, 814 F.2d 1381, 1382 (9th Cir. 1987).

The district court ruled that "[e]ven assuming that [USA] can establish a vertical conspiracy to maintain low prices, [it] cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing such prices to be predatory. Under the circumstances here concerned . . . no such showing can be made." We disagree.

II.

The question on appeal is whether in the absence of proof of predatory pricing a competitor can recover damages because of a maximum resale price maintenance agreement. Specifically, we must decide whether a competitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the category of "antitrust injury". This is a difficult question, and one of first impression in this circuit. The Supreme Court has not spoken on this issue, and among the circuit courts only the Seventh Circuit has taken a position. *See Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984), discussed below. The question requires us to look closely at the purposes and policies underlying the antitrust laws, and to determine which application of the doctrine of "antitrust injury" best implements those purposes and policies.

The concept of "antitrust injury" was put forward in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977):

> We therefore hold that for plaintiffs to recover treble damages . . . they must prove more than injury

> causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

In *Brunswick*, the plaintiffs argued that an illegal merger had kept alive failing competitors. The claim was that a violation of the antitrust laws had prevented the plaintiffs from obtaining monopoly profits. The Supreme Court's decision was not surprising: a plaintiff should not be able to claim damages for being unable to gain a monopoly position, the type of advantage the antitrust laws were meant to prevent. *See id.* at 487-88. The Court held that when the injury claimed "was not of 'the type that the statute was intended to forestall,'" damages under section 4 of the Clayton Act would not be available. *Id.* (quoting *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967)).[1] *See Orion Pictures Distribution Corp. v. Syufy Enters.*, 829 F.2d 946, 948-49 (9th Cir. 1987) (no antitrust injury where the injury claimed was caused by a breach of contract, not by the alleged antitrust violation).

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[1] One commentator summarized the holding of *Brunswick* as follows:

> Even if the plaintiff can show an antitrust violation, courts should allow treble damages only for injuries reflecting a disruption of competition in the plaintiff's market. From this perspective, *Brunswick* was an easy case. The plaintiffs may well have shown a violation of § 7—the mere possibility that a large firm active in many markets will cut prices or use other monopolization tactics in a new market is enough to show a § 7 violation—but they failed to show that their losses stemmed from the realization of this possibility. The defendant had merely kept afloat businesses that otherwise would have failed. It had not affected prices in any way. The "lost profits" the plaintiffs complained of were the result of the very situation that the antitrust laws are supposed to encourage—free competition among as many firms as a market can support.

Note, "Antitrust Standing, Antitrust Injury, and the Per Se Standard", 93 *Yale L.J.* 1309, 1320 & n.58 (1984).

III.

To determine whether the injury USA alleges is of the type the antitrust laws were meant to prevent, we must look first to the Supreme Court's discussions of price fixing under the antitrust laws.

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 151 (1940), a case involving horizontal price fixing, the Supreme Court held that price-fixing agreements were *per se* illegal. The Court responded as follows to the argument that the fixing of prices should be legal if the prices fixed were reasonable:

> The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.

Id. at 221. To the argument that the prices had been fixed in such a way as to stabilize the market, the Court stated:

> [I]n terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.
>
> . . .
>
> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.
>
> Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

Id. at 223, 225-26 n.59.

The Supreme Court in a later case thought it evident that the rule that price fixing was *per se* illegal extended to the fixing of maximum prices.

> The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices of their products does not violate the Sherman Act. For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said

> in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

Kiefer-Stewart involved both a vertical maximum price fixing (maximum resale price maintenance) agreement and a horizontal agreement among competitors to impose that price restraint. *Id.* at 212. When the issue of vertical maximum price-fixing was more directly raised, the Supreme Court affirmed that that form of market manipulation was covered by the *per se* rule against price fixing.

> We think *Kiefer-Stewart* was correctly decided and we adhere to it. Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an

> arrangement fixing minimum prices. It is our vew, therefore, that the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under §1 of the Sherman Act.

Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968) (footnote omited).[2]

In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court refused to withdraw maximum price fixing from the *per se* rule.

> Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix

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[2] The establishment of a *per se* rule against maximum vertical price fixing is more than merely a recognition that the anticompetitive effects of the practice outweigh the procompetitive effects. Dissent at 12723 n.1. Rather, it is a recognition that "such [procompetitive] cases are not sufficiently common or important enough to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549, 2557 n.16 (1977). Indeed, "*per se* rules are appropriate only for conduct that is manifestly anticompetitive, that is conduct that would always or almost always tend to restrict competition and decrease output." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988) (internal quotes and citations omitted).

With this in mind, the dissent's flat assertion, based on Professor (now Judge) Easterbrook's neo-classical economic views, that "[m]aximum vertical price fixing lacks the potential anticompetitive effects that maximum horizontal price fixing has, and in contrast has the potential for creating a competitive benefit" is simply irrelevant. Dissent at 12725-26 (citing Easterbrook, *Maximum Price Fixing*, 47 U. Chi. L. Rev. 886, 890 n.20 (1981)). To the extent that the Supreme Court's view of this issue differs from Judge Easterbrook's, we are required to apply the former.

> minimum or uniform prices. The per se rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition."

Id. at 348 (brackets in *Maricopa County*) (quoting Rahl, "Price Competition and the Price Fixing Rule—Preface and Perspective," 57 *Nw. U.L. Rev.* 137, 142 (1962)) (footnote omitted). It is clear that maximum resale price maintenance remains *per se* illegal.[3]

III.

We also look to the legislative history of the antitrust laws for guidance. Professor Eleanor Fox has summarized the findings of historians as follows:

> As history teaches, "efficiency" is not the reason for antitrust. Indeed, those who valued efficiency more than competition opposed antitrust bills on grounds that they would constrain some activity that might save costs for a producer and forbid some activity that does not interfere with optimal alloca-

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[3] Recently, in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the Solicitor General and a number of other *amici* asked the Supreme Court to reconsider the inclusion of resale price maintenance within the *per se* rule. The Court declined to do so. *Id.* at 761-62 n.7; *see Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988) (reaffirming the *per se* illegality of vertical price agreements).

Although the dissent disclaims taking any position on whether maximum vertical price fixing should any longer be *per se* illegal, dissent at 9 n.5, it is almost impossible to read the opinion's lengthy discourse on the benefits of this practice as saying anything else. It claims that ARCO's competitors are not harmed by its conduct, and that its consumers will only benefit. Yet, as discussed in Part III of this opinion, the Supreme Court has established *per se* rules against certain conduct only "for conduct that is manifestly anti-competitive, that is conduct that would always or almost always tend to restrict competition. . . ." *Business Elecs. Corp.*, 108 S. Ct. at 1519 (internal quotes and citations omitted).

> tion of resources. Rather than standing for efficiency, the American antitrust laws stand against private power. Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. Interest of consumers have been a recurrent concern because consumers have been perceived as victims of the abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.
>
> One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity of entrepreneurs): competition as process. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair.

Fox, "The Modernization of Antitrust: A New Equilibrium," 66 *Cornell L. Rev.* 1140, 1152-54 (1981) (footnotes omitted); *see* R. Hofstadter, "What Happened to the Antitrust Movement?", in *The Paranoid Style in American Politics and Other Essays* 188, 199-200 (1965).

Price-fixing of any kind distorts in a basic way the competitive process the antitrust laws were meant to protect. Two prominent commentators have described vertical price fixing as follows:

> [S]ucessfully maintained vertical price fixing is often the expression of economic power based on market

> imperfections, imbalances in bargaining power, or the presence of some level of oligopoly-like power due to trademarks or product differentiation. As such, vertical price fixing directly interferes with the freedom and opportunity of retail competitors to compete on the merits and usually results in higher prices to consumers. It enables the proponent of a restraint to assert an absolute property right and to suppress distributor competition on price, denying the right of independent distributors to succeed or fail on the competive merits.

Flynn & Ponsoldt, "Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes", 62 *N.L.U. L. Rev.* 1125, 1148 (1987).

The Supreme Court cases echo the historians' conclusions regarding the objectives of the antitrust laws. The Court states that the rules against price fixing have a number of objectives, including the protection of the competitive process. Congress intended that market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail. *See, e.g., Socony*, 310 U.S. at 221, 223, 225-26 n.59; *Kiefer-Stewart*, 340 U.S. at 213 (price fixing conspiracies "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"); *Albrecht*, 390 U.S. at 152-53 (price fixing conspiracies "severly intrude upon the ability of buyers to compete and survive in [the] market"); *Maricopa County*, 457 U.S. at 348 ("The *per se* rule 'is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' ") (quoting Rahl, "Price Competition and the Price Fixing Rule—Preface and Perspective", 57 *Nw. U.L. Rev.* 137, 142 (1962)). When sellers conspire to fix prices, the market mechanism

is distorted: prices may be driven higher,[4] some goods and services may not be offered, and sellers may succeed or fail for reasons other than their ability to respond to the demands of the market. Rules against price-fixing are thus meant to prevent harm to both consumers and to sellers.

The "antitrust injury" standard requires us to determine whether the plaintiff's injuries resulted from a disruption of competition in the plaintiff's market caused by the defendant's antitrust violation. *See generally* Note, "Antitrust Standing, Antitrust Injury, and the Per Se Standard", 93 *Yale L.J.* 1309 (1984). In the present case the inquiry seems straightforward: USA's claimed injuries were the direct result, and, indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries.

ARCO argues that USA, as ARCO's competitor, cannot claim an antitrust injury, because injury to competitors is not the type of injury that the rule against maxi-

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[4] The dissent's contention that maximum vertical price fixing is "less destructive than minimum price fixing because it generally results in lower prices to consumers," Dissent at 12725-26, is questionable at best, but in any event simply irrelevant. Both violations are classified as *per se* because the resulting harm to competition is extremely serious. Moreover, the Ninth Circuit case the dissent cites for its proposition, *Northwest Publications Inc. v. Crumb*, 752 F.2d 473, 475 (9th Cir. 1985), simply does not say what the dissent says it does. Although we did note that these restraints "*arguably* benefit consumers," *id.* (emphasis added), we also enumerated some of the reasons, as we do above, why the Supreme Court still holds that "maximum price-fixing is as pernicious as minimum price-fixing." *Id.* We discuss below our views of the other case the dissent cites, *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

mum resale price maintenance was meant to prevent—at least in cases where predatory pricing is not alleged.[5] ARCO's argument misconceives the Supreme Court's analysis. The Supreme Court has not discussed maximum resale price maintenance as a separate type of antitrust violation, but only as one form of price fixing. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 348; *Albrecht v. Herald Co.*, 390 U.S. at 152-53. Thus, the proper question is not what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent. The Supreme Court has indicated that the *per se* rule against price-fixing is aimed at the long-term as well as the short-term effects such practices have in the market, and not merely the immediate consequences for prices. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519-20 (1988) (characterizing interband competition as the primary concern of antitrust law, and listing "the creation and maintenance of small businesses" as one of its objectives). The removal of some elements of price competition distorts the markets, and harms all the participants:

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[5] In essence, this is also the position the dissent takes. "Maximum vertical price fixing is destructive when the prices set are predatory." Dissent at 12726-27 (citing *Matsushita*, 475 U.S. at 584). However, the Court in *Matsushita* did not comment on whether vertical price maintenance is destructive in the absence of predatory pricing. That issue was simply not before the Court or considered by it.

The dissent's position would preclude a finding of a violation of the antitrust laws in the case of the vast majority of unlawful maximum resale price agreements—i.e., those not accompanied by predatory conduct. No one, except an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement, would have standing to bring suit to challenge conduct which undeniably is forbidden by the antitrust laws. This would virtually amount to a finding that *Brunswick* has, *sub silentio*, overruled *Albrecht*, *Kiefer-Stewart*, and *Maricopa County*. P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 335.2(i), at 277 n.56 (1987 Supplement).

those retailers in the same market who are harmed by the distorted market, and the consumers. Even if we were to analyze the question at the more specific level of maximum resale price fixing, given the long-term consequences of that practice we would reach the same result for similar reasons.

ARCO relies in part on *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986). That reliance is misplaced. In *Cargill*, plaintiff, a large beef-packing firm, sought injunctive relief to enjoin the merger of the second and third largest beef-packing firms in the industry. The plaintiff asserted that the defendant would be able to lower its prices due to "multiplant efficiencies". *Id.* at 491. This would require plaintiff in turn to lower its prices, thus lowering its profits. *Id.* at 492. The Supreme Court held that this injury did not constitute "antitrust injury"; the Court relied in part on the fact that plaintiff had not shown that the defendant had engaged or would engage in unlawful or predatory pricing. *Id.* at 492-94. In other words, in *Cargill* the plaintiff failed to show that the pricing practices that it claimed was causing or would cause its injuries were illegal.[6] In fact, the Court termed the defendant's pricing policies "vigorous competition" and said that the antitrust laws protect small businesses "only against the loss of profits from practices forbidden by [those] laws." *Id.* at 492. In the present case, plaintiff's injuries result directly from pricing practices that defendants admit (for the purpose

[6] For a single firm's pricing practices to violate the antitrust laws, that firm must be engaged in predatory pricing or discriminatory pricing (the Robinson Patman Act, 15 U.S.C. § 13(a)). However, much less need be shown to assert that the pricing practices of two or more firms have violated the antitrust laws: it need only be shown that those firms have conspired to fix prices. *See generally* H. Hovenkamp, *Economics and Federal Antitrust Law* 92-124, 159-61, 172-73, 258-65 (1985). Here, a price-fixing agreement between ARCO and its dealers is alleged.

of this appeal) are forbidden by the antitrust laws and are therefore illegal.[7]

In *Cargill*, as in *Brunswick*, the connection between the antitrust violation and the activity which caused the alleged injury is attenuated or indirect. In those cases, the violation was a merger or an acquisition, and the injury occurred because of pricing practices which were themselves legal.[8] As the Court held, injuries derived from legal pricing practices are not necessarily the type of injuries rules against certain types of mergers and acquisitions were meant to prevent. *See Cargill*, 107 S. Ct. at 492-93; *Brunswick*, 429 U.S. at 486-88.

IV.

ARCO claims that USA does not have standing under the "antitrust injury" standard because maximum resale price maintenance increases rather than decreases competition.[9] Maximum resale price maintenance brings prices

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[7] There is another reason why *Cargill* is not dispositive. The law against monopoly involved in *Cargill*, section 7 of the Clayton Act, attempts to prevent market structures in which the competitive process is vulnerable to distortion. The distortion is only potential. In price-fixing cases, by contrast, the distortion of the price mechanism has, by definition, already occurred.

[8] This characterization applies equally well to *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont De Nemours & Co.*, 826 F.2d 1235 (3rd Cir. 1987), *cert. denied*, 56 U.S.L.W. 3843 (U.S. June 13, 1988). In *Alberta Gas*, plaintiff claimed that defendant's acquisition of a company caused the acquired company to cancel a project. Because the project was canceled, the acquired company bought less of plaintiff's product. The court found that the plaintiff had not shown antitrust injury. This, too, is an unsurprising finding: the connection between violation and injury is too attenuated for the plaintiff to claim, without more, that the injury involved is of the type the particular antitrust rule was meant to prevent.

[9] ARCO relies on *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), heavily, and the dissent does so equivocally, recognizing that the case is not controlling. In fact, *Murphy Tugboat* is wholly inapplicable. In *Murphy Tugboat*, one tugboat company

lower, not higher. If competitors fail, it is because they are not able to match the low prices charged by the maximum resale price maintenance retailers. This is a

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complained of the low fees charged by another tugboat company for the services of its licensed inland pilots. These lower fees were the result of a labor agreement entered into between the inland pilots and one of the defendants. Because the plaintiff was not a competitor in the area covered by the labor agreement, the legality of that agreement was irrelevant to our principal inquiry. In any event, we ultimately held that the agreement was valid. *Id.* at 1259. As a result, the plaintiff's claim depended entirely on whether the defendants' "overall pricing policies constitute[d] anticompetitive conduct." *Id.* at 1259. With the labor agreement, and thus the price-fixing allegation removed from the case, an antritrust violation could only be demonstrated by proof of a predatory pricing scheme. This is in stark contrast to the present case, in which the defendant's unlawful price-fixing is (for the purpose of the summary judgment motion) conceded and thus an antitrust violation is established without any need to show predatory pricing.

As the dissent points out, we did state in *Murphy Tugboat* that "[the antitrust laws] do not prohibit non-predatory conduct that results in a lower price to the consumer." Dissent at 12728-29. However, the dissent ignores the crucial fact that, in *Murphy Tugboat*, predatory pricing was a necessary element because, in the absence of such conduct, there was no *violation* of the antitrust laws. (It also fails to mention that *Murphy Tugboat* was not a maximum resale price case and did not purport to discuss the role of predatory conduct in such cases.) It was in connection with our discussion of whether a *violation* had occurred that we made the statement that the antitrust laws do not protect inefficient businessmen against others who establish lower prices but do not engage predatory conduct. Here, however, we are not seeking to determine whether a *violation* of the antitrust laws occurred. For our purposes, there is a *conceded violation* of those laws; specifically, it is agreed that a violation occurred in the absence of predatory pricing. The only question here is a cognizable injury.

In short, *Murphy Tugboat* deals solely with the issue of when a plaintiff who is not the defendant's competitor in the area in question may claim that an antitrust violation has occurred. The question of when a plaintiff who *is* a competitor can prove "antitrust injury" is the basic issue in the present case. Indeed, it is worth noting that the Seventh Circuit did not consider *Murphy Tugboat*

typical cost of competition, according to ARCO, and not a problem for antitrust policy. ARCO relies heavily on the argument that the antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). However, we have earlier discussed the problems with misreading that aphorism:

> The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is *not* true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1988).[10]

We reject ARCO's characterization that USA's injury resulted from "*increased*, not reduced . . . competition," as

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sufficiently on point to mention it when it considered the same question now before this court—whether competitors have antitrust injury *standing* in maximum resale price cases. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984).

[10] *See* Flynn & Ponsoldt, *supra*, at 1126 n.4 (citation omitted):

> One of the more popular cliches is that the antitrust laws protect competition, not competitors. The cliche implicitly asserts that one can have competition without competitors, contains no definition of "competition," and is frequently used to deny the congressionally defined goals of antitrust policy in favor of the narrow goals assumed by the neoclassical model.

contrary to the antitrust laws. As in the terms of the Robinson-Patman Act, 15 U.S.C. § 13(a), the success of some firms and the failure of other firms, when due to illegal pricing practices, must be characterized as a "lessen [ing] [of] competition", not an increase in competition. Also, when firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced services to consumers. *Cf. Albrecht,* 390 U.S. at 152-53; *Socony-Vacuum,* 310 U.S. at 221.

We note that commentators with a particular economic viewpoint have argued that maximum resale price maintenance should not be a *per se* violation of the antitrust laws.[11] However, we cannot ignore the fact that maximum resale price maintenance is *per se* illegal, simply because some might think that rule is unwise or because of commentators' speculation that the rule's demise might be in sight. *See Northwest Publications, Inc. v. Crumb,* 752 F.2d 473, 475 (9th Cir. 1985); *cf. Jack Walters & Sons Corp. v. Morton Building, Inc.,* 737 F.2d 698, 707, 709 (7th Cir. 1984). The Supreme Court has clearly stated—and restated—that maximum resale price maintenance, as a form of price fixing, is *per se* illegal, and that rule binds us until the Court or Congress[12] clearly states otherwise. USA alleges that ARCO's price-fixing had the objective of forcing independent gasoline retailers from the market, and that ARCO had been largely successful in that objective. In its complaint, USA states that "more than a dozen large independents have sold out, liquidated or drastically curtailed their operations, and many independ-

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[11] *See, e.g.,* Blair & Fesmire, "Maximum Price Fixing and the Goals of Antitrust", 37 *Syracuse L. Rev.* 43 (1986); H. Hovenkamp, *Economics and Federal Antitrust Law* 247-72 (1985); Easterbrook, "Maximum Price Fixing", 48 *U. Chi. L. Rev.* 886 (1981); R. Bork, *The Antitrust Paradox* 280-98 (1978).

[12] *See Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 769 (1984) (Brennan, J., concurring).

ent retail stations have been closed." It also states that the barriers to entry into the retail gasoline market have been heightened so that "once an independnt is eliminated, it is highly unlikely that it will be replaced." The objective and effect of ARCO's illegal pricing scheme has been to reduce the number of independent gasoline retailers, in other words, to reduce competition. USA complains that it has suffered financial losses and is being driven out of the market by ARCO's illegal price-fixing. This is the type of injury that the antitrust rules were meant to prevent.

Finally, we consider the Seventh Circuit's treatment of the issue. In *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984), Walters, a building-materials dealer, was a distributor of goods produced by Morton, a manufacturer of prefabricated farm buildings. Walters claimed, among other things, that Morton had coerced its dealers, including Walters, to maintain a conspiracy to maintain maximum resale prices. *Id.* at 706. The district court dismissed Walters' claims, and the Seventh Circuit affirmed. Regarding the maximum resale price maintenance, Judge Posner, writing for the court, concluded that Walters had not shown antitrust injury:

> In the present case, even if Morton did violate the prohibition against fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. . . . Walters will not be heard to complaint about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust injury.

Id. at 709.

We disagree.[13] The antitrust laws were, as we discussed earlier, intended to give entrepreneurs and independent distributors an "even playing field." The competitive process can only rule when participants in the process are not allowed to combine to fix prices ahead of time.[14] We conclude that the purposes and policies of the antitrust laws are best effectuated by recognizing the "standing" of competitors to enforce the antitrust laws against price-fixing conspiracies. To put the same point differently, we conclude that the injury done to the market and to com-

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[13] As one commentator has noted:

> Even consumers would not be able to bring actions under the rule established in Judge Posner's opinion in *Jack Walters & Sons Corp. v. Morton Building*. . . .
>
> . . . I cannot escape the conclusion that Judge Posner—growing impatient with Congress's or the Supreme Court's refusal to overrule *Albrecht*—has decided to undertake that task on his own.
>
> Members of the Chicago School have visions, as do most of us, of the kinds of things that should obtain in a perfect world. The per se rule against resale price maintenance is definitely not among them. That fact justifies arguments, both theoretical and political. But it does not justify taking the matter into one's own hands, no matter how certain we may be that we are right.

Hovenkamp, "Chicago and Its Alternatives", 1986 *Duke L.J.* 1014, 1025-26 (footnote omitted).

[14] *Cf.* Flynn & Ponsoldt, *supra*, at 1149:

> [A conspiracy to fix prices] is a direct displacement of the competitive process of price determination. It is an assumption of power by the proponent of the restraint, denying rights of distributors and consumers to make their own judgments about pricing—a denial of rights guaranteed by the goals of antitrust policy. Congress did not leave to the proponents of such restraints the authority to determine unilaterally the scope of the contract rights of distributors. Similarly, Congress did not intend the proponents of maximum price fixing to determine what the best price should be for the benefit of the public.

petitors by price-fixing conspiracies is antitrust injury—the type of injury the antitrust laws were mean to protect.[15]

For the reasons stated above, we reverse the decision of the district court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[15] We recognize that our decision conflicts with that of the Seventh Circuit. In *U.S. v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987), we said "absent some good reason to do so, we are disinclined to create a direct conflict with another circuit." We did not intend by that statement to surrender our authority to decide important issues of first impression or to suggest that we would adopt the view of the first circuit to consider such issues in every instance. Rather, we meant that we would give respectful attention to the views of the other circuit and carefully evaluate that circuit's analysis before settling on ours. Here we have done so and we find good reason to disagree with the result reached by Judge Posner.

ALARCON, Circuit Judge, dissenting:

I.

In this antitrust action, plaintiff/appellant USA Petroleum Company ("USA") appeals from the district court's order granting summary judgment in favor of defendant appellee Atlantic Richfield Company ("ARCO") for USA's failure to demonstrate "antitrust injury." I respectfully disagree with the majority's conclusion that the district court erred. Because USA failed to present any facts showing antitrust injury, I would affirm.

II.

USA, a gasoline retailer, brought this action to challenge ARCO's marketing program in which ARCO discontinued its credit cards and offered lower gasoline prices to consumers. USA claimed ARCO, a major integrated oil company violated section 1 of the Sherman Act, 15 U.S.C. §1 (1982), by conspiring with certain retail dealers to set retail prices for ARCO-brand gasoline at levels USA could not match. USA claimed ARCO violated section 2 of the Sherman Act, 15 U.S.C. §2 (1982), by attempting to monopolize the retail gasoline market through the "predatory pricing" of its ARCO-brand gasoline. USA also asserted claims for violations of the Robinson-Patman Act, the Cartwright Act and various state laws.

USA claimed ARCO's increased price competition resulted in it having "lost sales it otherwise would have made." USA sought compensation for these lost sales under section 4 of the Clayton Act, 15 U.S.C. §15 (1982), which provides, in part, "[a]ny person who shall be injured . . . by reason of any thing forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained."

ARCO moved for summary judgment on USA's sections 1 and 2 claims. ARCO contended USA's section 2 claim failed for no "dangerous probability" existed that ARCO-brand sellers would monopolize the market. ARCO contended USA's section 1 claim failed for want of antitrust injury. ARCO contended the injury USA described in its complaint was not antitrust injury because it resulted solely from non-predatory price completition.

In response to this motion, USA voluntarily dismissed its section 2 claim. Thereafter, ARCO renewed its motion concerning USA's section 1 claim. The district court held that, even assuming a vertical conspiracy to fix maximum prices, USA "cannot satisfy the 'antitrust injury' requirement of Clayton Act §4, without showing . . . [the prices charged for ARCO gasoline] to be predatory." The court found those prices were not predatory. Accordingly, it granted ARCO's motion and dismissed USA's complaint with prejudice.

III.

USA claims the district court misapplied the substantive law when it concluded the injury USA suffered as a result of the alleged price-fixing conspiracy was not antitrust injury, i.e. "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977). USA contends it suffered antitrust injury because its injury resulted from an illegal price-fixing conspiracy.

We review independently and non-deferentially a contention that the district court misapplied the substantive law in its order granting summary judgment. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). We view the evidence in the light most favorable to USA, the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Baker v. Department of Navy*, 814 F.2d 1381, 1382 (9th Cir.) *cert. denied*, 108 S. Ct. 150 (1987).

IV.

The issue presented on this appeal is a difficult question of first impression. We are asked to determine whether a retail competitor suffers antitrust injury in the form of lost profits as a result of a non-predatory maximum vertical price fixing agreement. We must assume for purposes of this appeal that USA could prove a *per se* violation of Sherman Act §1 for maximum vertical price fixing. However, as the Supreme Court in *Matsushita* instructs, ". . . [USA] must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct." 475 U.S. at 586.

The concept of antitrust injury had its origins in the Supreme Court's decision in *Brunswick*, 429 U.S. 477. In *Brunswick*, the plaintiff bowling alley operators brought a treble damage action under section 4 of the Clayton Act against a competing bowling alley operator. Plaintiffs claimed their competitor's acquisition of several bowling alleys in the proximity of their operation violated section 7 of the Clayton Act inasmuch as it threatened to "create a monopoly." *Id.* at 480. To establish damages, the plaintiffs demonstrated that had the competitor not acquired the alleys, those alleys would have closed and plaintiffs' profits would have increased from the resultant reduction in competition.

The Supreme Court held that plaintiffs seeking treble damages under section 4

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 488-89 (emphasis in original). Applying this principle, the Court held that plaintiffs' claim failed for their injury resulted solely from preservation of competition. An injury suffered on account of preservation of competition, according to the Court, is not one the "antitrust laws were intended to prevent." *Id.* at 488.

V.

Section 1 of the Sherman Act, 15 U.S.C. §1 (1982) provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Price fixing agreements, whether they set minimum or maximum prices or whether they are horizontal or vertical agreements, are all deemed *per se* violations of Sherman Act §1 despite the fact that some types of price fixing agreements may have competitive benefits. *See e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S. Ct. 720, 724 (1987) (minimum vertical price fixing); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (horizontal maximum price fixing); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum vertical price fixing); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (vertical and horizontal maximum price fixing); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (horizontal minimum price fixing). The *per se* rule is biased in part on "economic prediction, judicial convenience, and business certainty." 457 U.S. at 354. Thus, "[a]s in every rule of general application, the match between the presumed and the actual is imperfect." *Id.* at 344. *See also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977) ("cases that do not fit the generalization may arise"). Because the match between the conduct and the rule may be imperfect, it follows that some conduct which does not fit the reason for finding an antitrust violation may not

result in antitrust injury or may result in only limited antitrust injury.[1]

The majority states that the proper question is not "what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent." Maj. op. at 12. This inquiry ignores the *Brunswick* requirement that the injury reflect the anticompetitive effect of the violation. The anticompetitive effects will be different depending on the type of price fixing agreement. Thus, the Supreme Court instructs us that:

> The term "restraint of trade" in [Sherman Act §1], like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances.

Business Electronic Corp. v. Sharp Electronics Corp., —— U.S. ——, 108 S. Ct. 1515, 1523 (1988). Therefore, we must analyze "illegal price fixing agreements" to determine whether the agreement is horizontal or vertical *and* whether it sets maximum or minimum prices so we can properly determine the economic consequences and anticompetitive effects. This inquiry is necessary to

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[1] USA asserts that the *per se* rule conclusively presumes that maximum vertical price fixing is anticompetitive so it can have any procompetitive consequences. On the contrary, the *per se* rule is a recognition that although price fixing agreements may have some procompetitive potential, the anticompetitive effects on balance outweigh the procompetitive aspects. *See Continental T.V., Inc.*, 433 U.S. at 50 n.16. Antitrust injury analysis requires that the "injury" reflect the anticompetitive effect of the violation, not any procompetitive effects. *See Brunswick*, 429 U.S. at 488-89. For examples of antitrust violations without antitrust injury, *see Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (7th Cir. 1986); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1469-1470 (1985); 2 P. Areeda & D. Turner, *Antitrust Law*, ¶¶ 345 & 346.

determine whether an injury allegedly caused by "illegal price fixing" is of the type the antitrust laws were meant to prevent.

In general, horizontal price fixing agreements are illegal because they create market power that did not previously exist and this cooperative action among competitors creates a restraint that is otherwise not possible. 7 P. Areeda, *Antitrust Law*, ¶1437 (1986). In contrast, a vertical price restraint ordinarily does not increase anyone's market power but merely reflects existing power of one party in the marketplace. 7 P. Areeda, *Antitrust Law*, ¶1437 (1986). The impact of vertical price restrictions is to reduce or eliminate intrabrand competition[2] without necessarily impacting interbrand competition.[3] *See Continental T.V., Inc.*, 433 U.S. at 51-52 (1977); Shores, *Vertical Price-Fixing And The Contract Conundrum: Beyond Monsanto*, 54 Fordham L. Rev. 377, 379 (1985). In contrast, horizontal price restraints drastically reduce interbrand competition. *See White Motor Co. v. United States*, 372 U.S. 253, 267 (1963) (Brennan, J., concurring); *see also, Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 n. 18 (1982) ("horizontal restraints are generally less defensible than vertical restraints"); Shores, *supra*. at 401. A reduction in interbrand competiton causes more concern under the antitrust law, because interbrand competition is seen as the primary concern of the antitrust law. *Continental T.V., Inc.*, 433 U.S. at 52 n. 19.

The effect of minimum price fixing, whether horizontal or vertical, is generally higher prices. Pitofsky, *In Defense of Discounters: The No-Frills Case for A Per Se*

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[2] Intrabrand competition involves competition among sellers of the same brand of the same product. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977).

[3] Interbrand competition involves competition between sellers of different brands of the same generic product. *Continental T.V., Inc.*, 433 U.S. at 52 n.19.

Rule Against Vertical Price Fixing, 71 Geo. L. J. 1487, 1488 (1983); *324 Liquors*, 475 U.S. 335, 107 S. Ct. at 723. In addition, minimum vertical price fixing, unlike some other types of vertical restraints, is similar to horizontal price fixing because it restricts interbrand competition. *Continental T.V., Inc.*, 433 U.S. at 51 n. 18 (*citing White Motor Co.*, 372 U.S. at 268 (Brennan, J., concurring)).

Maximum price fixing, whether vertical or horizontal, is not viewed as being as destructive as minimum price fixing principally because it generally results in lower prices to consumers. *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473, 475 (9th Cir. 1985); *accord Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-709 (7th Cir.) *cert. denied*, 469 U.S. 1018 (1984). Maximum horizontal price fixing is viewed as more anticompetitive than maximum vertical price fixing because of its potential to eliminate interbrand competition.[4] Maximum vertical price fixing lacks the potential anticompetitive effects that maximum horizontal price fixing has, and in contrast has the potential for creating a competiive benefit. *See* Easterbrook, *supra*, at 890 n.20.[5] Indeed, maximum vertical price fixing by a

[4] For a discussion of the potential anticompetitive effects of maximum horizontal price fixing, *see* Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 900-908 (1981). Despite the potential anticompetitive effects of maximum horizontal price fixing, Easterbrook argues that the *per se* rule should be abandoned in the maximum horizontal price fixing case. *Id.*

[5] Because maximum vertical price fixing is viewed as having some procompetitive benefits and because its economic effect is not very different from nonprice vertical restraints, *Continental T.V., Inc.*, 433 U.S. at 69 & n.10, many commentators have argued that it should be analyzed under the rule of reason. Easterbrook, *supra* at 890 n.20; Pitofsky, *supra*, at 1490 n.17; *cf. Vertical Price Fixing*, 98 Harv. L. Rev. 983 (1985); *see also, The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1153 n.3 (9th Cir. 1988) (presenting, "[a]n abbreviated bibliography of this debate"). I also note that the Supreme Court was asked by the Solicitor General and other

single manufacturer may stimulate interbrand competition.[6] *See 324 Liquor Corp.*, 479 U.S. 335, 107 S. Ct. at 724 ("a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition") (emphasis in original). Maximum vertical price fixing is destructive when the prices set are predatory. *See Matsushita*, 475 U.S. at 584. Below cost prices are seen as predatory "chiefly in cases in which a single firm having a dominant share of the market, cuts its prices in order to force competition out of the market, or perhaps to

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amici in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), to reconsider whether vertical price restrictions should always be unlawful. The Supreme Court declined to reach the question because it had not been presented in the district court nor raised on appeal. 465 U.S. at 761 n.7. Similarly, this argument was not raised in the case before us, and I express no opinion as to the merits of this argument.

[6] I note that the Supreme Court in dictum in *Business Electronic Corp.*, 108 S. Ct. at 1520 stated that "vertical price restraints reduce *inter*brand price competition." From the Court's citations it is clear that the Court was referring to *minimum* vertical price restraints. The Court cites *Continental T.V., Inc.*, 433 U.S. at 51 n.18, which quotes Justice Brennan's concurring opinion in *White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) where he stated, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." Resale price maintenance has traditionally been used to refer to *minimum* vertical price fixing and was used by Justice Brennan in the context of a minimum vertical price fixing case. Similarly, the Court relies on Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 294 (1975) in support of its comment. Again, Posner uses the term "resale price maintenance" to refer to minimum vertical price fixing. *See id.* at 292, n.36. Furthermore, Posner uses Justice White's quote to refer to the "rule of *Dr. Miles*" which was a minimum vertical price fixing case. *Id.* at 294. Posner criticizes the Court for not drawing a distinction between minimum and maximum vertical price fixing. *Id.* at 297.

deter potential entrants from coming in." *Id.* at 584 n.8. Thus, USA's injury must be viewed in the context of the alleged antitrust violation to determine whether the alleged injury results from the *anticompetitive* aspects of the maximum vertical price fixing agreement.

VI.

The antitrust injury analysis in a maximum vertical price fixing agreement is difficult because, as one commentator states, "[s]upplier regulation of the *maximum* prices charged by dealers is virtually never anticompetitive." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶335.2h, n.56 (Supp. 1987); *see also* Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1469-1470 (1985) (when price fixing agreements reduce prices and increase output, no harm from the practice can be antitrust injury); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 490-492 (1980). If the conduct is not anticompetitive, it follows that no antitrust injury exists.

The most common scenario involving a maximum vertical price fixing agreement involves a suit by dealers or distributors against their suppliers. The "restraint of trade" involved in a maximum vertical price fixing agreement between a supplier and its dealers is the elimination or drastic reduction of competition in the intraband market. Whether a coerced dealer in fact suffers antitrust injury by such an agreement would depend on the particular circumstances. 1 P. Areeda & D. Turner, *Antitrust Law* ¶346c (1978); *see e.g. Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-09 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (maximum vertical price fixing agreement did not result in antitrust injury to dealer); *cf. Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976) *cert. denied*, 433 U.S. 910 (1977) (pre *Brunswick* case awarding terminated dealers lost profits).

A case like the one before us invoking an action by one competitor against its rival's supplier cannot be satisfactorily resolved by adopting the analysis of the dealer versus supplier cases. Although a plaintiff does not have to "prove an actual lessening of competition in order to recover, . . . the case for relief will be strongest where competition has been diminished." *Brunswick*, 429 U.S. at 489 n. 14. Thus, the drastic reduction or elimination of competition in the intra-brand market suggests that antitrust injury is more likely to occur in the dealer-versus-supplier cases. Furthermore, the dealer-versus-supplier cases usually involve coercion and threats which impair a dealer's "freedom" to set prices.[7]

The closest case to the facts presented here is *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). In *Murphy Tugboat*, the plaintiff tugboat company sued a rival tugboat company for treble damages under section 4 of the Clayton Act. The plaintiff claimed that the rival tugboat company entered into a price fixing agreement with inland pilots which set the fees for the pilots' services at a level that was lower than the fees otherwise charged by pilots in the San Francisco area. *Id.* at 1258. The plaintiff tugboat company claimed the pilot fee agreement was anticompetitive because the rival's package price, which included the tugs and the pilot fees, was lower than it would have been absent the agreement. If the rival's package price was lower, the plaintiff would have been able to charge a higher price or maintain price and increase market share. *Id.* at 1257-58. The plaintiff claimed these lost profits as damages.

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[7] Although USA alleged that it was "forced" to match ARCO's prices, it is difficult to see how ARCO with only 17% of the gasoline market during its most successful month "forced" USA to match ARCO's prices when most of the market had set prices above those required by ARCO. It would appear instead that USA voluntarily chose to match ARCO's reduced price to remain competitive.

We stated in *Murphy Tugboat* that the plaintiff did not and could not complain about the pilot fee agreement because the plaintiff was not operating in the pilot services market. We held that the rival's package price did not violate Sherman Act §1 because the package price, which was always higher than the plaintiff's price, was not below cost. Therefore, the package price was not predatory and the rival did not violate Sherman Act §1. In reaching this conclusion we stated, "[the antitrust laws] do not prohibit non-predatory conduct that results in a lower price to the consumer. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors." *Id.* at 1259.

Murphy Tugboat is instructive, but it is not controlling because it differs from the present case in several important respects. First, the alleged price fixing in *Murphy Tugboat* did not exist in the plaintiff's tugboat market, it existed in the inland pilot market. Here, the alleged price fixing exists in USA's retail gasoline market. Second, in *Murphy Tugboat* the package price charged to customers was not fixed. Only one component cost of the package price (the pilot fee) was fixed. In contrast, USA alleges that ARCO fixed the gasoline price charged to retail customers, not that ARCO fixed some component cost of supplying gasoline.

My research has not disclosed a case in this circuit or in any other jurisdiction dealing with a competitor versus its rival's supplier which addresses the antitrust injury requirement of Clayton Act §4 in the context of a maximum vertical price fixing agreement in violation of Sherman Act §1.* Instead, I have found repeated affirma-

* *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) contains facts similar to the facts presented here. However, I do not find *King & King Enterprises* helpful because it did not discuss the antitrust injury requirement and it involved a horizontal conspiracy to fix maximum prices.

tions of the principle that the Sherman Act was designed by Congress as a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), and was not designed to insulate competitors from vigorous competition. *See Brunswick*, 429 U.S. at 488 *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) ("the antitrust laws . . . were enacted for 'the protection of *competition* not *competitors*' ") (emphasis in original); *accord Triple M Roofing Corp. v. Tremco., Inc.*, 753 F.2d 242, 243 (2d Cir. 1985) ("[t]he antitrust laws were never intended to provide a balm for the hardships occasioned by vigorous competition"); *Matsushita*, 475 U.S. at 594 ("cutting prices in order to increase business often is the very essence of competition); *cf. Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 495 (1986) ("a plaintiff seeking injunctive relief under §16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury").

VII.

Turning to the facts before us, USA has alleged that ARCO conspired with its dealers to engage in maximum vertical price fixing to set prices below the market level.[9] The district court found ARCO's prices were not predatory,[10] and USA does not challenge this finding on appeal.

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[9] USA has not alleged and no facts exist in the record to suggest that any maximum horizontal price fixing agreement was also in existence. Vertical price fixing agreements which also have a horizontal element cause concern because not only do they reduce or eliminate intrabrand competition, but they have the potential to eliminate or drastically reduce interbrand competition. *See Keifer-Steward Co. v. Seagram & Sons*, 340 U.S. 211 (1951).

[10] For a claim of a conspiracy to engage in *predatory pricing* the Supreme Court has stated that a plaintiff does not suffer "antitrust injury unless petitioners conspired to drive [plaintiff] out of the relevant markets by (i) pricing below the level necessary to see their products, or (ii) pricing below some appropriate measure

The impact of ARCO's alleged maximum vertical price fixing scheme would be to reduce or eliminate intrabrand competition among ARCO brand dealers without necessarily impacting interbrand competition.[11] Arguably, interbrand competition in the "discount gasoline submarket[12] would be stimulated by ARCO's entry into the independent retailers' market niche. At the same time those gasoline dealers in the interbrand market who already were selling at prices higher than USA and ARCO may not have been affected by ARCO's alleged price fixing agreement. In any event, the essence of USA's claim is that one of the major oil companies, ARCO, intruded upon the independent retailers' market niche by under pricing the independent retailers. The result is lower prices to consumers, but less profit for USA. USA's loss of profits from ARCO's vigorous competition is not antitrust injury.[13] The district court did not err in granting summary judgment in ARCO's favor on the basis of USA's failure to demonstrate antitrust injury.

USA attempts to avoid this result by reformulating the *Brunswick* test. USA misstates that test as inquiring

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of cost." *Matsushita*, 475 U.S. at 585 n.8. USA acknowledges that this standard is inapplicable to a conspiracy to engage in maximum vertical price fixing.

[11] *See* Allison, *An Analysis of the Vertical Price-Nonprice Dichotomy*, 21 Akron L. Rev. 131 (1987). Allison conducted a study of price and non-price vertical restraints. In ten out of the eleven cases he studied involving maximum vertical price fixing and no other restraints, only intrabrand competition was affected. *Id.* at 166, table 1.

[12] USA argued below that the discount gasoline submarket was a market separate from the retail gasoline market. The district court's findings established that no separate discount gasoline market existed.

[13] According to the majority, as a result of price fixing, retail competitors are "harmed by the distorted market." Maj. op. at 12711. However, the majority does not explain what the harm is or what the market distortion is.

whether ARCO's alleged *anticompetitive acts* were of the type the antitrust laws were intended to prevent as opposed to whether its *injury* was of the type the antitrust laws were intended to prevent. After reformulating the test, USA devotes the bulk of its efforts to demonstrate ARCO's alleged price-fixing activities were of the type the antitrust laws were intended to prevent. Having established this to its satisfaction, USA contends "[a]ll that remains . . . is that USA show that its claimed damages flow from the presumed market distorting effects." Since, according to USA, the question of "flow" is "necessarily a fact intensive inquiry," USA concludes that this court must remand this issue for jury determination.

USA's reformulation of the *Brunswick* test transforms it into a simple question of causation. This mistaken notion directly contravenes *Brunswick*. The *Brunswick* court held plaintiffs seeking treble damages "must prove *more* than injury causally linked to an illegal presence in the market." *Brunswick*, 429 U.S. at 489 (emphasis added). As one commentator has persuasively stated using an example similar to the facts presented here,

> Even if causation is assumed, we must ask whether the plaintiff is entitled to be free of a rival product's lowered price that is entirely lawful apart from the assumed vertical agreement. . . . [T]he plaintiff would rely on the assumed causation, but query whether protecting the plaintiff's interest in higher prices serves the purposes of the antitrust laws. . . . So long as the price of the defendant's product is itself lawful, the only reason for awarding the competitor treble damages is to encourage him to sue, but we have already seen that rationale to be insufficient. And the protection of the defendant's rivals is not the reason for prohibiting maximum resale maintenance. Those more directly affected are fully capable of suing, if they feel themselves detri-

> mentally affected. And if they do not, perhaps the social interest in forbidding the practice is weak to begin with.

(Footnote omitted) 2 P. Areeda, *Antitrust Law* ¶346c (1978).

Under the majority's analysis price fixing "distorts the markets, and harms all the participants." Maj. op. at 12709-10. Thus, the majority implies that retail dealers, retail competitors and consumers all suffer antitrust injury as a result of any illegal price fixing agreement. The majority's conclusion ignores the fact that consumers are not injured by maximum vertical price fixing, and retail competitors are not injured and cannot complain about minimum vertical price fixing. *Matsushita*, 475 U.S. at 582-83, 584 n.8. Market participants may all be harmed by different types of price fixing agreements, but they can only bring an action based on the type of agreement that injures them. The majority's refusal to analyze this case in the context of a maximum vertical price fixing agreement,[14] by relying instead on a generic illegal price fixing analysis, has resulted in a dissertation which is premised on "market distortions" that are never fully defined or explained.

I would affirm the district court's order granting summary judgment because USA failed to demonstrate antitrust injury.

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[14] The majority does state that, "[e]ven if [they] were to analyze the question at the more specific level of maximum resale price fixing, given the long term consequences of that practice [they] would reach the same result for similar reasons." Maj. op. at 12711. However, the long term consequences the majority notes are higher prices and reduced services to consumers. Maj. op. at 12715. USA as a competitor would not suffer antitrust injury from either of these speculative long term consequences.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED FEBRUARY 25, 1987

No. 83-3508-WPG (Bx)

USA PETROLEUM COMPANY,
Plaintiff,
v.
ATLANTIC RICHFIELD COMPANY,
Defendant.

PRETRIAL ORDER (1) SPECIFYING UNCONTROVERTED FACTS AND (2) DETERMINING THE LEGAL SUFFICIENCY OF PLAINTIFF'S SHERMAN ACT §1 CASE.

Defendant Atlantic Richfield Company's Motion For A Pretrial Order (1) Defining The Relevant Product Market And (2) Determining The Legal Sufficiency Of Plaintiff's Sherman Act §1 Case And Proposed Proof Of Vertical Conspiracy ("Defendant's Motion"), having come on for hearing before the Court in a pretrial conference pursuant to Fed. R. Civ. P. 16, and the Court having considered the memoranda and other papers filed by the parties and the factual record previously submitted by Atlantic Richfield Company ("Atlantic Richfield") in support of its motion for partial summary judgment, and having heard oral argument,

IT IS HEREBY ORDERED that Defendant's Motion be granted as set forth below:

Uncontroverted Facts Concerning The Relevant Market And Likelihood of Monopolization

1. The facts set forth below in paragraphs 2 to 4 have been established without substantial controversy and shall therefore be deemed established for all purposes in this action pursuant to Fed. R. Civ. P. 56(d).

2. The "discount segment of gasoline marketing," as alleged to exist in paragraphs 14, 15 and 19 of the First Amended Complaint, does not exist as a separate and distinct product market for antitrust purposes. As set forth more fully in paragraphs 2(a)-(e) below, major-brand and minor-brand gasoline retailers compete with each other in the same market.

a. Consumers can use major-brand and minor-brand gasolines reasonably interchangeably because generally applicable government and industry specifications essentially standardize the chemical characteristics affecting gasoline quality and performance.

b. Major and independent refiners and marketers freely buy, sell and exchange gasoline among each other.

c. The prices of major-brand and minor-brand gasoline exhibit patterns of closely parallel movement. These highly correlated prices show that major-brand and minor-brand gasoline sales occur in a single market.

d. The alleged marketing practices of minor-brand sellers cited by plaintiff USA Petroleum Company ("USA") as placing them in a separate market—low prices, cash-only sales and self-service vendors—are also widely used by major-brand sellers.

e. Both Atlantic Richfield and USA recognized that major-brand and minor-brand stations compete in a single market by regularly surveying prices at both types of stations in setting their own prices.

3. The combined share of the relevant market held by Atlantic Richfield and other ARCO-brand gasoline sellers is clearly insufficient to present a dangerous probability of monopolization, particularly in light of the competition of other major oil companies. The ARCO-brand share of the retail gasoline market in California and Washington, the states in which USA contends it has been injured, has not exceeded 17 percent during the relevant period.

4. Even assuming *arguendo* that there exists a separate "discount" gasoline market, other major oil companies may enter this market, as USA contends that Atlantic Richfield did in April 1982, and the possibility of such entry effectively prevents Atlantic Richfield and other sellers of ARCO-brand gasoline from exercising monopoly power in that market regardless of their market share.

Legal Sufficiency Of Plaintiff USA's Sherman Act §1 Case And Proposed Proof of Vertical Conspiracy

5. Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the "antitrust injury" requirement of Clayton Act §4, without showing such prices to be predatory. Under the circumstances here concerned, as indicated in paragraphs 2 to 4 hereof, no such showing can be made. *Cargill, Inc. v. Monfort of Colorado, Inc.*, —— U.S. —— (December 9, 1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, et al.*, 475 U.S. —— (March 26, 1986); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984). Count One therefore shall be, and hereby is, dismissed with prejudice.

Rule 54(b) Certification

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay

and accordingly directs the entry of a final judgment dismissing the First Count of the Complaint, which pertains to the alleged violation of § 1 of the Sherman Act, 15 U.S.C. §1.

DATED: February 19, 1987.

WILLIAM P. GRAY
United States District Judge

APPENDIX F

LIST OF PETITIONER'S NON-WHOLLY OWNED SUBSIDIARIES

AAPSS92, Inc.
AAPSS93, Inc.
AAPSS94, Inc.
Agro Internacional, S. de R. L. de C.V.
ARCO Centennial Corp.
ARCO Channelview, Inc.
ARCO Chemical Americas
ARCO Chemical Asia Pacific, Ltd.
ARCO Chemical Australia Pty Limited
ARCO Chemical Canada Inc.
ARCO Chemical China, Limited
ARCO Chemical Company
ARCO Chemical Company Philadelphia, Inc.
ARCO Chemical Delaware Company
ARCO Chemical (Deutschland) GmbH
ARCO Chemical Eastern Europe Gesellschaft m.b.H.
ARCO Chemical Espana Co.
ARCO Chemical Europe, Inc.
ARCO Chemical (Europe) Inc.
ARCO Chemical Export Sales Company
ARCO Chemical Foreign Sales Corp.
ARCO Chemical Holding Company
ARCO Chemical Indonesia, Inc.
ARCO Chemical International Co.
ARCO Chemical Japan, Inc.
ARCO Chemical Korea, Inc.
ARCO Chemical Korea WV-Polys Company
ARCO Chemical Leasing Company
ARCO Chemical (Malaysia) Sdn. Bhd.
ARCO Chemical Middle East, Inc.
ARCO Chemical New Zealand, Inc.
ARCO Chemical Overseas Services, Inc.
ARCO Chemical Pan America, Inc.

ARCO Chemical (Philippines) Inc.
ARCO Chemical Polyols Company
ARCO Chemical Products Europe, Inc.
ARCO Chemical Puerto Rico, Inc.
ARCO Chemical Recycling, Inc.
ARCO Chemical (Singapore) PTE, Ltd.
ARCO Chemical Taiwan, Inc.
ARCO Chemical Technology, Inc.
ARCO Chemical (Thailand) Limited
ARCO Chemical Trading, Inc.
ARCO Chemical Waste Management, Inc.
ARCO Chemie Nederland, Ltd.
ARCO Chemie Technologie Nederland B.V.
ARCO Chimie France Corporation
ARCO Chimie France S.N.C.
ARCO Elastomers, Inc.
ARCO France, Inc.
ARCO/JSP Company
ARCO Lyondell, Inc.
ARCO Mont Belvieu Corporation
ARCO Quimica do Brazil, Ltda
ARCO Solar Nigeria Ltd
ARCO Synthesis, Inc.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Chiunglong Petrochemical Co., Ltd.
Compania de Petroleo Ganso Azul, Ltda.
85819 Canada Limited
EnArco Resins S.p.A.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company
Logan Aluminum Inc.
Los Palacios Exploration Corp.
Lyondell Licensing Inc.

Lyondell Petrochemical Company
Lyondell Petrochemical de Mexico, Inc.
Lyondell Polymers Corporation
Lyondell Rancho Pipeline Company
N. T. Development, Inc.
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
Olympic Pipeline Company
Oxirane Chemical Company
Oxirane Technology (Japan) Company (Partnership)
P. T. Gema Polytana Kimia
POSM Delaware, Inc.
POSM II Limited Partnership, L.P.
POSM II Properties Partnership
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Thums Long Beach Company
West Properties, Inc.
Yukong ARCO Chemical Ltd.

Petitioner has no parent corporation.

Supreme Court, U.
FILED
MAY 7 1993
OFFICE OF THE CLERK

No. 92-1614

In The

Supreme Court of the United States

October Term, 1992

IN RE ATLANTIC RICHFIELD COMPANY,

Petitioner.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Ninth Circuit And The Honorable Dorothy W. Nelson And Stephen Reinhardt, Judges, United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT USA PETROLEUM COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990), this Court held that a vertical maximum price-fixing agreement "does not cause a competitor antitrust injury unless it results in predatory pricing." This Court declined, however, to define predatory pricing. *Id.* at 341 n.10. Consistent with this decision, the Ninth Circuit held that, on remand to the district court, "USA is entitled to attempt to prove that ARCO conspired to set predatory prices." 972 F.2d 1070, 1076 (9th Cir. 1992). ARCO filed a petition for rehearing and suggestion for rehearing *en banc* that relied, in part, on the Fourth Circuit's decision in *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335 (4th Cir.), *cert. granted*, 113 S. Ct. 430 (1992). After the petition for writ of certiorari in that case was granted and after ARCO filed a brief as *amicus curiae*, the Ninth Circuit withdrew ARCO's petition for rehearing from submission pending this Court's decision in *Brown & Williamson*. ARCO's petition for writ of mandamus presents the following questions:

1. Whether ARCO's petition is premature, given that the Ninth Circuit is reconsidering its decision based on ARCO's petition for rehearing and suggestion for rehearing *en banc*.

2. Whether ARCO has failed to demonstrate the drastic and extraordinary circumstances required for writs of mandamus, given that the Ninth Circuit is faithfully following this Court's mandate in both of the following respects:

QUESTIONS PRESENTED – Continued

a. The Ninth Circuit's holding that USA Petroleum does not suffer antitrust injury unless it proves predatory pricing is consistent with this Court's mandate.

b. This Court declined to define predatory pricing and left that issue open for determination on remand.

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No. 92-1614

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IN RE ATLANTIC RICHFIELD COMPANY,

Petitioner.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Ninth Circuit And The Honorable Dorothy W. Nelson And Stephen Reinhardt, Judges, United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT USA PETROLEUM COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

The writ of mandamus sought by petitioner Atlantic Richfield Company ("ARCO") is completely unjustified and impermissible under the narrow guidelines of 28 U.S.C. § 1651. Respondent USA Petroleum Company ("USA")[1] respectfully requests that this Court deny the petition for writ of mandamus.

[1] USA's corporate affiliates and subsidiaries, not wholly owned, are USA Petroleum (Bermuda) Limited, Isla Petroleum Corporation and Gasolinas de Puerto Rico Corporation.

REASONS FOR DENYING THE WRIT

This Court's power to issue an extraordinary writ is a drastic and sparingly exercised remedy, reserved for cases where there is an usurpation of judicial power and appeal is a clearly inadequate remedy. *Parr v. United States*, 351 U.S. 513, 520-21 (1956); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-84 (1953). An extraordinary writ is *not* intended as a substitute for a petition for writ of certiorari filed after final judgment in the court of appeals. In this case, ARCO's petition for writ of mandamus raises the identical issue regarding the scope of this Court's mandate on which ARCO based its pending petition for rehearing and suggestion for rehearing en banc in the Ninth Circuit. If, after the Ninth Circuit rules on ARCO's petition, ARCO is dissatisfied with the outcome, ARCO intends to petition for a writ of certiorari. (Petition at 3 & n.2.) ARCO has failed to articulate any reason why normal appellate procedures do not adequately protect its rights.

Unfortunately, ARCO's petition also illustrates one of the reasons that extraordinary writs are reserved for truly exceptional cases. As this Court observed, "[extraordinary writs] have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." *Bankers Life*, 346 U.S. at 384-85 (*quoting Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947)). ARCO's serious charges against two of the judges on the Ninth Circuit panel is completely unjustified. Nothing in the Ninth Circuit's initial decision on remand usurps this Court's authority. The majority opinion expressly acknowledged twice that this Court

reversed its judgment and conscientiously construed this Court's mandate, a matter within its jurisdiction.

ARCO apparently believes that the Ninth Circuit will refuse to grant it relief to which it is *not* entitled under this Court's decision. This is not justification for a writ of mandamus and this Court should reject ARCO's attempt to use the All Writs Act to maintain concurrent appeals.

ARCO FAILED TO SATISFY ITS BURDEN ON A PETITION FOR WRIT OF MANDAMUS[2]

ARCO bears the heavy burden of demonstrating that its right to issuance of the writ of mandamus is "clear and indisputable." *Bankers Life*, 346 U.S. at 384. To justify a writ of mandamus, ARCO must demonstrate that (1) adequate relief cannot be obtained in any other form or from any other court, and (2) the writ will be in aid of the Court's appellate jurisdiction. ARCO has not, and cannot, establish either one of these requirements.

A. ARCO's Petition For Writ of Mandamus Is Duplicative and Unjustified

ARCO's pending petition for rehearing and suggestion for rehearing *en banc* before the Ninth Circuit on the very issue of this Court's mandate provides an adequate

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[2] USA vigorously disagrees with ARCO's statement of the case. Because most of the issues are not necessary to the resolution of ARCO's petition, USA does not include a separate "Statement of the Case." To the extent relevant to ARCO's petition, USA disputes ARCO's assertions in the body of this brief.

forum for it to obtain the judicial remedy it seeks. Concurrent appeals on the same issue by the same party are impermissible.

By filing a petition for rehearing, which requested the same relief sought from this Court, ARCO destroyed the finality of the very decision it contends violated this Court's mandate. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). The uncertainty created by a petition for rehearing is precisely why a motion for rehearing tolls the time within which review in this Court must be sought. *Missouri v. Jenkins*, 495 U.S. 33, 45-46 (1990). "[W]hile the petition for rehearing is pending, there is no judgment to be reviewed." *Id.* at 46. As recently described by this Court, the principal purpose of a petition for rehearing is to give the court an opportunity to determine whether or not its judgment should be modified. *Id.* at 46 n.14; *Pink*, 317 U.S. at 266. Had ARCO not intended to affect a change in the majority's decision, it could not have properly filed a petition for rehearing.

At this stage, therefore, the outcome of the Ninth Circuit's review is simply unknown.[3] The Ninth Circuit's Order of March 17, 1993, (ARCO's Appendix C) merely evidenced a desire by the original panel to await this Court's decision in *Brown & Williamson*, a case on which ARCO relied in its petition for rehearing and in which

---

[3] ARCO's citation to *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978), is misplaced. In that case, the litigant petitioned for a writ of mandamus from a *final* decision of the district court. There was no possibility that the district court would modify its order. *Id.* at 494-95.

ARCO submitted a brief as *amicus curiae* before this Court. Nothing more can be gleaned from the Ninth Circuit's order. It is presumptuous and unreasonable for ARCO to conclude from this order that its petition for rehearing and suggestion for rehearing en banc has been denied.

Given that it is impossible for this Court to compare its mandate with an as-yet-to-be-determined final decision from the Ninth Circuit, this Court should deny ARCO's petition for writ of mandamus and permit the Ninth Circuit to complete its review of ARCO's petition before it.

B. The Ninth Circuit Is Following This Court's Mandate on Remand.

Even assuming that the Ninth Circuit's original decision on remand will be unaffected by ARCO's petition for rehearing and suggestion for rehearing en banc, a writ of mandamus in this case would still be improper. There is absolutely nothing in the original Majority Opinion in this case to support ARCO's contention that a writ of mandamus is necessary because of the Ninth Circuit's refusal to follow this Court's mandate. (Petition at 12.)

1. The Scope of this Court's Mandate.

This Court remanded the case to the Ninth Circuit "for proceedings consistent with this opinion." *ARCO*, 495 U.S. at 346. Under this mandate, the Ninth Circuit must determine what was decided by this Court and what issues were left for determination on remand. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979); *Sprague v. Ticonic*

National Bank, 307 U.S. 161 (1939); *Hartford Life Insurance Co. v. Blincoe*, 255 U.S. 129, 134 (1921).

It is well established that, on remand, the Court of Appeals is free to adjudicate any issues not decided by the Supreme Court. *Quern*, 440 U.S. at 347 n.18; *Sprague*, 307 U.S. at 168. The lower court is foreclosed, however, from reconsidering matters decided by the Supreme Court. *Quern*, 440 U.S. at 347 n.18; *Sprague*, 307 U.S. at 167-68.

This Court's failure to decide an issue explicitly leaves that issue open for consideration by the lower court. *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) (*per curiam*); *Hartford*, 255 U.S. at 136-37. "Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to." *Hartford*, 255 U.S. at 136.

As shown in its initial decision, the majority did not go beyond this Court's mandate. The Ninth Circuit simply remanded the case to the district court to determine whether USA could prove its case consistent with the legal standard established by this Court, and decided an issue expressly left open by this Court's decision. Both of these matters were within the Ninth Circuit's jurisdiction.

2. The Ninth Circuit Correctly Requires USA to Prove Price-Fixing at Predatory Levels

The single holding in this court's decision was that a vertical maximum price-fixing agreement "does not cause a competitor antitrust injury unless it results in predatory

pricing." 495 U.S. at 339. The Ninth Circuit's initial decision followed this mandate and held that "USA is entitled to attempt to prove that ARCO conspired to set predatory prices." 972 F.2d at 1076.

Contrary to ARCO's argument, this Court did not decide the basic issue of whether USA could prove predatory pricing that caused it antitrust injury. As this Court stated at the outset: "For purposes of this case we likewise *assume* that petitioner's pricing was not predatory in nature." 495 U.S. at 333 n.3 (emphasis added). This Court made that assumption because the Ninth Circuit's decision never reached the predatory pricing issue. 972 F.2d at 1073. Thus, on remand, the Ninth Circuit found that the factual merits of USA's predatory pricing claim remained to be adjudicated.

ARCO attempts to convert this Court's "assumption" into an "adjudication" by arguing that USA made no such showing before the district court on ARCO's motion for summary judgment. (Petition at 5-6.) The Ninth Circuit correctly rejected ARCO's attempt to rewrite its motion for summary judgment in order to fit this Court's decision. 972 F.2d at 1074 ("ARCO's motion for summary judgment did not controvert that [predatory pricing] claim.") Indeed, ARCO's summary judgment motion conceded that USA could raise a justiciable controversy on that issue. *Id.* at 1074 & n.4. Although ARCO now claims that it moved for judgment on whether its prices were predatory (Petition at 5), the plain language of its motion contradicts that assertion. ARCO requested judgment on one, and only one, basis:

> [T]he Rule 16 order should . . . dismiss USA's claims as legally defective on the ground that the ruling that there is no likelihood of successful monopolization precludes them from satisfying the 'antitrust injury' requirement.

(Docket Number (D.N.)* 83 at 2.)[4]

An "assumption" cannot, as ARCO contends, be reasonably construed to have decided the issue of whether USA could adduce facts on its claim that ARCO fixed prices at predatory levels. Although ARCO and the dissent below cite the Court's subsequent statements that USA could not prove antitrust injury (Petition at 8), those statements flowed from this Court's explicit *assumption*,

---

* The D.N. citations refer to the list of Relevant Docket Entries in the Joint Appendix cited by ARCO.

[4] ARCO's motion, filed before any depositions were taken, did not challenge the allegations that ARCO fixed prices at predatory levels and the Ninth Circuit did not require USA to offer proof on that issue. 972 F.2d at 1074. Instead, USA argued that, even assuming a predatory pricing requirement, USA need not prove a dangerous probability of successful monopolization. (D.N. 89 at 11-13.) The district court granted summary judgment based solely on the lack of threatened monopolization. (ARCO's Appendix E, ¶¶ 2-4; 10/14/86 Tr. at 8.)

Nor did counsel waive its predatory price-fixing claim at oral argument. (Petition at 6.) The only point that USA conceded was the single issue raised by ARCO's motion: the lack of a dangerous probability of successful monopolization. Counsel stated that: "[I]t is not likely[,] viewing the retail gasoline market as a whole[,] that we could show that ARCO [ha]s a dangerous probability of monopolization." (10/14/86 Tr. at 10.) Both USA's opposition brief and counsel's oral argument preserved its predatory pricing claim as this Court described the offense in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986). (D.N. 89 at 8; 10/14/86 Tr. at 20-22.)

for purposes of its decision, that ARCO's fixed prices were not at predatory levels.

Notwithstanding ARCO's argument, this Court's decision in *NAACP v. Alabama*, 357 U.S. 449 (1958), does not stand for the proposition that an assumption may be converted into a finding. In *NAACP*, this Court made a *finding*, based on the underlying record, that the NAACP had complied with the production order except for membership lists. *Id.* at 243 (citing 357 U.S. 449, 465 (1958)). On remand, the Supreme Court of Alabama concluded that this Court was "mistaken." *Id.* at 242. This Court correctly held that the State's claim of mistake came too late. *Id.* at 243.

By contrast, this Court characterized the predicate of its decision as an assumption and not as a conclusion or finding. Because the Supreme Court did not decide whether ARCO's fixed prices were predatory, the Court did not enter judgment for ARCO; rather, it remanded the case to this Court to determine what the appropriate disposition should be. Consistent with that remand, the Ninth Circuit remanded the case to the district court for a factual determination of whether or not ARCO's fixed prices were at predatory levels.[5]

---

[5] USA brought this lawsuit to challenge ARCO's scheme to eliminate the price competition afforded by independent gasoline marketers such as USA. Contrary to ARCO's description of the complaint, USA does *not* challenge any price reductions that resulted from ARCO's discontinuance of its credit card or any legitimate cost savings. (Petition at 4.) Instead, USA complained that ARCO fixed prices at predatory levels wherever its dealers competed with USA and other independents. (J.A. 18.) Further, ARCO's vertical maximum price-fixing scheme facilitated predatory pricing because it enabled ARCO and its

3. This Court Expressly Declined to Define Predatory Pricing and Left Open the Dangerous Probability of Successful Monopolization Issue

ARCO's contention that the Ninth Circuit failed to follow this Court's mandate by not requiring proof of a dangerous probability of successful monopolization ignores the simple fact that the Court did not even address this argument. This Court's decision did not even mention, let alone decide, the issue of whether antitrust injury in cases involving price-fixing at predatory levels requires a showing of dangerous probability of successful monopolization. While acknowledging that "a vertical price-fixing scheme may facilitate predatory pricing," (495 U.S. at 340 n.9), this Court stated: "We have no occasion in the instant case to consider the proper definition of predatory pricing, nor to determine whether our dictum in *Matsushita* that predatory pricing might consist of 'pricing below the level necessary to sell [the offender's] products,' [citation omitted], is an accurate statement of the law." *Id.* at 341 n.10.

Because this Court explicitly left this question open, there is absolutely *no* basis for ARCO's argument that the Supreme Court adopted a "dangerous probability of successful monopolization" requirement and that the Ninth

---

dealers to share the loss from predatory pricing while at the same time imposing the full loss on USA and other independents that could not share losses through conspiracy with a supplier. With the independents eliminated, ARCO recouped its losses in the historically non-competitive, oligopolistic gasoline market.

Circuit's initial decision on remand conflicts with that mandate.[6] (Petition at 9-11.)

ARCO nevertheless argues that a threatened monopolization requirement may be inferred from the Court's rejection of USA's argument that requiring predatory pricing for purposes of antitrust injury would impermissibly blur the distinction between Section 1 and Section 2 of the Sherman Act. However, the Supreme Court's discussion is expressly directed to the question of "pricing practices" and nowhere mentions dangerous probability of successful monopolization:

> Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under § 1 of the Sherman Act, rather than an attempt to monopolize prohibited by § 2. Respondent notes that the two sections of the Act are quite different. Price-fixing violates § 1, for example, even if a single firm's decision to price at the same level would not create § 2 liability. . . . In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under § 2 of the Sherman Act.
>
> We reject respondent's argument. Although a vertical, maximum price-fixing agreement is unlawful under § 1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing. Antitrust injury

---

[6] ARCO's petition for certiorari, which addressed only the basis of the Ninth Circuit's original decision, did not request review of the dangerous probability of successful monopolization issue.

> does not arise for purposes of § 4 of the Clayton Act [citation omitted], until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct [citation omitted]; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect.

Id. at 338-39 (emphasis in original; footnotes omitted).

This Court's quotation is crystal clear: To prove antitrust injury, USA need only prove price-fixing at predatory levels. There is no intimation that any additional showing, such as threatened monopolization, is required. In fact, this Court went out of its way to note the distinction between Section 1, which governs concerted activity and reaches unreasonable restraints of trade, and Section 2, which governs unilateral conduct and requires a showing of attempted monopolization. *Id.*

CONCLUSION

As premature and lacking in exceptional justification, ARCO's petition for writ of mandamus should be denied.

Respectfully submitted,

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1614

IN RE ATLANTIC RICHFIELD COMPANY,
Petitioner.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit and the Honorable Dorothy W. Nelson and Stephen Reinhardt, Judges, United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this reply brief in support of its Petition for a Writ of Mandamus (the "Petition").

ARGUMENT

The Brief in Opposition ("Opp. Br.") of USA Petroleum Company ("USA") argues (1) that a writ of mandamus is not justified because the Ninth Circuit decision permitting USA to try to prove antitrust injury does not conflict with this Court's mandate, and (2) that ARCO's petition is premature. USA is wrong on both counts. USA's first argument relies entirely on mischaracterizations of this Court's opinion, ARCO's argument and the record. *See* pp. 2-7. USA's second argument ignores the Ninth Circuit's March 17, 1993 Order (Petition Appendix C), which shows that the Ninth Circuit already has rejected ARCO's argument that the remand

decision impermissibly conflicts with this Court's mandate. The Ninth Circuit's rejection of that argument, which is the only argument raised by ARCO's Petition, makes the issue ripe for review by this Court. *See* pp. 7-8.

I. USA CHARACTERIZES THE NINTH CIRCUIT'S OPINION AS CONSISTENT WITH THIS COURT'S MANDATE ONLY BY MISREADING THE COURT'S OPINION, MISCONSTRUING ARCO'S ARGUMENT AND DISTORTING THE RECORD

A. USA's Argument That This Court Left Open The Issue Of Whether USA Suffered Antitrust Injury Is Incorrect

USA's effort to prove that this Court did not definitively dispose of USA's Sherman Act § 1 claim for lack of antitrust injury is based on its assertion that:

> "The single holding in this court's decision was that a vertical maximum price-fixing agreement 'does not cause a competitor antitrust injury unless it results in predatory pricing.' "

Opp. Brief at 6-7. In describing this statement of antitrust injury law as the "single holding" in the opinion, USA ignores the sentence in the opinion in which the Court actually announced its holding. In language that could not be clearer, the Court stated: "We . . . *hold* that respondent has failed to meet the antitrust injury test in this case." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335 (1990) (emphasis added). The Court repeated its holding in the final paragraph of the opinion: "Respondent has failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346. This holding unequivocally disposed of USA's Sherman Act § 1 claim and left no issue open for the Ninth Circuit to decide.[1] Only by ignoring the parts of the opinion

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[1] Had this Court believed that it was leaving any issue open for the Ninth Circuit to decide, it would have said so. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 24 (1979) (reversing judgment of

where the Court stated its holding can USA construct an argument that the Ninth Circuit's decision permitting it to try to prove antitrust injury does not conflict with this Court's mandate.

Notwithstanding this Court's holding, USA argues that it should be entitled on remand to establish antitrust injury by proving predatory pricing. USA states: "[c]ontrary to ARCO's argument, this Court did not decide the basic issue of whether USA could prove predatory pricing that caused it antitrust injury." Opp. Brief at 7. USA misrepresents ARCO's position and fails to grasp the scope of this Court's holding. ARCO has never contended that this Court decided whether ARCO's pricing was predatory. Indeed, ARCO's Petition acknowledges that this Court's holding is based upon the assumed premise that ARCO's pricing was not predatory. Petition at 8. The point is that this Court did not need to determine whether USA could prove that ARCO engaged in predatory pricing because this Court was entitled to assume (as it did assume) that USA could not make such a showing. The Court was entitled to make this assumption because USA had deliberately abandoned its predatory pricing claim below. USA did not even try to prove predatory pricing when such a showing was required to oppose ARCO's summary judgment motion, which was based on the proposition that USA could not prove predatory pricing. And it did not challenge in the Ninth Circuit the district court's express finding that it could not prove predatory pricing.[2] *See* USA's Opening Brief in

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court of appeals and remanding "for further proceedings *to consider any unresolved issues that CBS may have properly brought to the Court of Appeals*") (emphasis added). The Court here simply remanded "for further proceedings consistent with this opinion." 495 U.S. at 346.

[2] USA now argues that it was not required to raise the predatory pricing issue in the lower courts because ARCO's summary judgment motion was not based on the absence of predatory pricing. Opp. Br. at 7-8. USA's assertion is wrong. ARCO rested its sum-

the Ninth Circuit, at 6 (acknowledging that USA had "offered no proof on predatory pricing or dangerous probability of monopolization" in the district court); *see also USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 689 (9th Cir. 1988) (identifying as the sole issue on appeal "whether *in the absence of predatory pricing* a competitor can recover damages because of a resale price agreement") (emphasis added).[3]

Contrary to USA's assertion, there is no rule of law that "[t]his Court's failure to decide an issue explicitly leaves that issue open for consideration by the lower court." Opp. Br. at 6. USA cites *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970), and *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 134 (1921), but neither supports USA's argument. The correct rule is that an issue need not be expressly decided by the Supreme Court to be fore-

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mary judgment motion squarely on the proposition that USA could establish antitrust injury only if it could establish predatory pricing, and that USA could not establish predatory pricing. Docket Number 83 at 10, 16-18. And, at the hearing on the motion, USA *agreed* that it could not prove predatory pricing, because ARCO posed no dangerous probability of monopolization. USA's counsel there stated: "I believe there is no dangerous probability of monopolization and *therefore* the idea that this price is predatory . . . even by the most liberal standard, is probably going to fail." 10/14/86 Tr. 19 (emphasis added). Finally, the district court expressly found that USA could not prove that ARCO's prices were predatory: "[U]nder the circumstances here concerned . . . no such showing [that ARCO prices were predatory] can be made." Petition Appendix E, ¶ 5. It is far too late in the day for USA to argue that ARCO's original motion was not based on the absence of predatory pricing.

[3] ARCO's Reply Brief In Support Of Petition For Writ Of Certiorari (at 5-8) spelled out these and other facts showing USA's abandonment of its predatory pricing claim in the district court and the Ninth Circuit. These facts are also set forth in detail in Judge Alarcon's dissent from the Ninth Circuit's opinion on remand and the accompanying appendix. 972 F.2d at 1077-87; *see, e.g.*, 972 F.2d at 1081 ("USA informed the district court and this court that it offered no evidence on predatory pricing").

closed from further consideration, as long as it is "within [the] compass" of the Court's mandate. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939) (matters not expressly decided by the Supreme Court may still be within the Court's mandate). The issue whether USA could prove antitrust injury by establishing predatory pricing is certainly "within the compass" of this Court's holding that USA "has failed to meet the antitrust injury test in this case." 495 U.S. at 335.

NAACP v. Alabama, 360 U.S. 240 (1959) (cited in Petition at 13-14), demonstrates that the Court can fully dispose of a case even when the disposition is based upon a premise it assumed rather than decided. USA disputes this, and contends that the Court in *NAACP* based its holding on a finding of fact that it made (rather than on an assumed premise). But USA's contention is incorrect. The Court did not make any finding that the NAACP had complied with the production order except for membership lists; rather, it assumed that this was the case because the State of Alabama had never argued otherwise. *Id.* at 243 ("[t]he State made not even an indication that other portions of the production order had not been complied with," which led the Court to presume that the NAACP had "*apparently* complied satisfactorily with the production order, except for the membership list") (emphasis added). This was the assumption, or "premise," "on which the Court disposed of the case," and the Court held that the State's post-disposition attack on that premise came too late. *Id.* at 243. Similarly, USA's attack on this Court's assumption also comes too late. " 'Whatever was before the Court, and is disposed of, is considered as finally settled.' " *Id.* at 244-45.

By intentionally choosing not to challenge ARCO's showing on predatory pricing when it was required to in the lower courts, USA foreclosed itself from raising this issue, which permitted this Court to hold that USA "has

failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346.

B. USA's Argument That This Court Did Not Rule That A Competitor Must Prove Predatory Pricing Under Sherman Act § 2 Standards In Order To Establish Antitrust Injury Under Sherman Act § 1 Is Incorrect

In addition to failing to recognize that this Court's opinion completely disposed of USA's showing on antitrust injury, the Ninth Circuit also ignored this Court's statements that a competitor-plaintiff in a § 1 case can prove antitrust injury only by establishing predatory pricing in violation of § 2. USA does not dispute that the Ninth Circuit on remand ruled that § 2 standards are irrelevant to the antitrust injury issue in a § 1 case. But, USA contends that the Ninth Circuit's opinion is consistent with this Court's opinion, which it asserts "went out of its way to note the distinction between Section 1 . . . and Section 2." Opp. Br. at 10-12.

USA's argument simply cannot be squared with this Court's opinion. The Court "reject[ed]" USA's argument that it "suffered antitrust injury even if petitioner's pricing was not predatory under § 2 of the Sherman Act." 495 U.S. at 339. USA asserts that this means only that a competitor must prove price-fixing at "predatory levels," and need not show conduct in violation of § 2. Opp. Br. at 12. But USA's interpretation gives no effect to the phrase "under § 2 of the Sherman Act." By adding "under § 2 of the Sherman Act" after "predatory," the Court stated that predatory pricing required for antitrust injury in a § 1 case must satisfy the requirements of § 2, including threatened monopolization.[4]

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[4] USA's footnote 6 (Opp. Br. at 11), which notes that ARCO's petition for certiorari did not seek review of the dangerous probability of successful monopolization issue, is beside the point. ARCO did not need to seek review of that issue because it was

II. ARCO'S PETITION IS RIPE FOR REVIEW

Seven months after ARCO filed its petition for rehearing and suggestion for rehearing *en banc*, the Ninth Circuit issued its order withdrawing the "case" "from submission pending a decision from the Supreme Court in *Liggett*." Petition Appendix C. By issuing this order, the Ninth Circuit showed that it had rejected ARCO's rehearing petition to the extent it is based on the failure of the Ninth Circuit to obey this Court's mandate in this case. Nothing in *Liggett* is or possibly could be relevant to this issue, which is determined solely by comparing the Ninth Circuit's opinion on remand with this Court's opinion. By rejecting ARCO's inconsistency argument, the Ninth Circuit effectively has made its final required disposition.[5] The Ninth Circuit's disobedient action is therefore ripe for correction by this Court by a writ of mandamus.

The two cases cited by USA to support its contention that ARCO's petition for a writ of mandamus is premature are inapposite. Each of those cases involved a petition for a writ of *certiorari*. *Department of Banking v. Pink*, 317 U.S. 264 (1942); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (cited in Opp. Br. at 4). The time limitations involved in applying for a writ of certiorari do not apply to a petition for an extraordinary writ. *Compare* S. Ct. Rules 13 and 20. Indeed, the Court's discretion to grant

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entitled to rely on the district court's unchallenged finding that USA could not prove predatory pricing. In any event, USA *did* present this issue in its "Questions Presented" in its brief on the merits. *See* USA's Brief for Respondent, at i ("must a competitor prove, in order to demonstrate antitrust injury, that the price-fixers . . . had a dangerous probability of successful monopolization. . .").

[5] The Ninth Circuit is not required to rule on ARCO's suggestion for rehearing *en banc*. "'A suggestion is neither a petition nor a motion; consequently, it requires no disposition by the Court.'" *Missouri v. Jenkins*, 495 U.S. 33, 47 n.14 (1990) (quoting Ward, *The Federal Rules of Appellate Procedure*, 28 Federal B.J. 100, 110-11 (1968)).

a writ of mandamus is "very broad," and, as opposed to a writ of certiorari, the Court need not wait for a formal entry of judgment or denial of rehearing in the circuit court. R. L. Stern, E. Gressman & S. M. Shapiro, *Supreme Court Practice* 503 (6th ed. 1986). Under the unique circumstances of this case, in which the Ninth Circuit has effectively denied ARCO's rehearing petition but has precluded ARCO from petitioning for a writ of certiorari, mandamus is the only remedy available.

CONCLUSION

For the reasons stated above and in ARCO's Petition, a writ of mandamus should issue to compel Judges Nelson and Reinhardt to follow this Court's mandate.

Respectfully submitted,

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